IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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October Term, 1979

No. 78-1832

JULIUS T. CUYLER, SUPERINTENDENT
and
DISTRICT ATTORNEY OF PHILADELPHIA,
Petitioner

v.

JOHN SULLIVAN,
Respondent

BRIEF FOR PETITIONER

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1B-21B and 1A-5A) is reported at 593 F.2d 512. The opinion of the Supreme Court of Pennsylvania (Pet. App. 1D-70D) is reported at 472 Pa. 129, 371 A.2d 468.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1979. A petition for rehearing *en banc* was timely filed and denied on March 12, 1979. The petition for a writ of certiorari was filed on June 7, 1979, and was granted on October 1, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether the Third Circuit improperly vacated respondent's Pennsylvania murder and conspiracy convictions upon its finding that there was a possibility of conflict of interest, however remote, resulting from the joint representation of respondent and his two co-defendants by the same two attorneys.

II. Whether because the Sixth Amendment violation alleged below was not caused or fostered by state action, the Third Circuit erroneously found that violation to be an appropriate ground for issuing the writ of habeas corpus.

III. Whether the Third Circuit transgressed appropriate limits of appellate review by making *de novo* findings of fact and credibility based solely upon its assessment of the record of the state court hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Six.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment Fourteen, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Code, Act of June 25, 1948. c. 646, 62 Stat. 967; As Amended Nov. 2, 1966, Pub. L. 89-711, §2, 80 Stat. 1105, 28 U.S.C. §2254(d).

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing; . . .

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the

court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceedings, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT

This Court granted the petition for certiorari to review the decision of the Third Circuit issuing a writ of habeas corpus, on the ground that respondent John Sullivan was deprived of his Sixth Amendment right to the effective assistance of counsel. The Third Circuit based its decision upon a finding of a potential conflict of interest, however remote, caused by the joint representation of Sullivan and two co-defendants by two retained counsel.[1] In granting relief, the Third Circuit reversed the District Court's denial

1. In their dissent from the denial of reargument *en banc*, three judges of the Third Circuit characterized this case as involving dual representation, because the defendants herein were not tried jointly. Other courts have made varying uses of the terms dual and joint representation. To avoid undue confusion, this brief will use the term joint representation to denote all forms of multiple representation of co-defendants in criminal cases. Where the question of joint or separate trials of the co-defendants is of distinct relevance to the analysis, it will be specifically discussed.

References to the Appendix to this brief will be designated (A.). References to the opinions of the courts below, reprinted in full in the Appendix to the Petition for Certiorari, will be designated (Pet. App.); the published opinions of the Pennsylvania Supreme Court and the Third Circuit will also be cited. References to portions of the record not reproduced in the Appendix will be appropriately designated (e.g., Trial, Hearing) and the date noted.

of the writ and overruled state court findings that no conflict of interest had been established.[2]

The Third Circuit's decision was founded upon testimony presented at an evidentiary hearing in state court, pursuant to Sullivan's petition for collateral post-conviction relief. Upon review of that testimony, the Third Circuit ruled that two strategic trial decisions, that Sullivan not take the stand and that no other defense witnesses be called, although reasonably based, were possibly influenced by a potential conflict of interest arising out of counsel's joint representation of two co-defendants awaiting trial following disposition of Sullivan's case (Pet. App. 12B-20B; 593 F.2d at 519-523).

1. Sullivan's Decision Not to Testify

Following their indictment, the three defendants retained G. Fred DiBona, Esquire, now a judge of the Phila-

2. Sullivan was convicted on two counts of murder in the first degree in June, 1967, after a jury trial in the Court of Common Pleas, Philadelphia County, and was subsequently sentenced to two consecutive terms of life imprisonment. The convoluted procedural history of this case, and a review of the evidence presented at trial, are set forth in the opinion of the Third Circuit (Pet. App. 2B-8B; 593 F.2d at 515-517).

In brief, Sullivan and two co-defendants, Gregory Carchidi and Anthony DiPasquale, were indicted for the assassination-style killings of John Gorey, an official of Local 107 of the Teamster's Union, and his companion Rita Janda, inside Gorey's office at the union hall on Friday evening, June 17, 1966. Francis McGrath, a janitor, testified that when he arrived for work about 6:00 p.m., he found Sullivan sitting by a window of a second floor office. McGrath ignored Sullivan's advice to postpone the cleaning until Sunday, and was working in the conference room when Gorey and Janda arrived. Sullivan, joined by Carchidi, again unsuccessfully urged McGrath to depart. Shortly after Sullivan left the room, McGrath heard what sounded to him like "firecrackers going off in rapid succession," and asked Carchidi "What was that?" Carchidi told McGrath to "Get out of the building and don't say nothing." The bullet-riddled bodies were discovered the next morning (Pet. App. 5B-8B; 593 F.2d at 516-517).

delphia Court of Common Pleas, and A. Charles Peruto, Esquire. According to Peruto, Sullivan chose Judge DiBona as his chief trial counsel, with Peruto assisting him, while the other two co-defendants, who were to be separately tried, selected Peruto as chief counsel (A. 54a, 57a-58a, 73a-74a, 203a).[3]

At the state court evidentiary hearing on the conflict of interest claim, Judge DiBona testified that following the prosecution's case he, Peruto, and Sullivan conferred for one and one-half to two hours before deciding not to present a defense. Both counsel advised Sullivan that the prosecution's circumstantial case was, in their opinion, insufficient to support conviction by the jury. According to Judge DiBona, Sullivan did not want to take the stand, against DiBona's strong recommendation that he testify, while Peruto suggested various reasons why such action might be dangerous. After discussing the matter overnight with his brother and other members of the family, Sullivan, acting on his own, "definitely made up his mind that he would not testify" (A. 12a-13a).

Peruto agreed that it was Sullivan himself who made the decision not to testify. At the hearing, Peruto stated that he could not specifically recall which of the two attorneys advised Sullivan not to take the stand, but that he

3. At Sullivan's trial, Judge DiBona examined witnesses and delivered opening and closing arguments. Peruto assisted in the examination of jurors on voir dire, conferred throughout trial with Sullivan and with DiBona, and argued motions and objections. After the verdict was returned, Peruto argued the penalty phase to the jury because DiBona was so upset by the verdict that he was unable to continue; Peruto opened his argument by apologizing for his "eleventh hour entry" into the trial. At the hearing, Sullivan claimed that he did not select Judge DiBona, and did not know that DiBona was to be chief counsel until trial commenced. Carchidi and DiPasquale were subsequently acquitted after trial (A. 46a-47a, 64a-65a, 73a 127a-128a; Pet. App. 8B-12B; 593 F.2d at 517-519; Trial, June 20, 1967).

would accept Judge DiBona's recollection of the conference. Peruto explained that the attorneys were concerned because by taking the stand, Sullivan might enable the prosecutor to elicit that, while at the union hall on the evening of the murders, Sullivan (who was married) had telephoned a girlfriend by whom he had fathered two children, and "I thought [that] might hurt Sullivan more than the benefit that he would get out of putting the testimony on. But it was a value judgment" (A. 57a-60a).

Contradicting both trial counsel, Sullivan testified that he had wanted to take the stand, but that the decision was given to him by Peruto "point blank" after Peruto assured him of acquittal. Sullivan agreed that counsel advised him of the weakness of the prosecution's case, and that Peruto warned him of the danger that cross-examination would elicit his meretricious relationship with his girlfriend, Shirley Davis. Sullivan testified that he rejected the latter argument, explaining that "[m]y motive for not taking the stand was strictly based that there was no evidence that had nothing to do with Shirley Davis" [sic] (A. 100a-106a, 138a, 156a-157a).[4]

The state hearing court rejected Sullivan's assertion that the decision not to testify was forced upon him, finding that the decision was made by Sullivan and counsel after full consultation and was not marred by any question of ineffective assistance (Pet. App. 7F). Affirming the denial of relief, the Pennsylvania Supreme Court found that the decision not to present Sullivan's testimony was reasonably based, and not the product of a conflict of interest (Pet. App. 33D-34D; 472 Pa. at 161-162, 371 A.2d at 483-484). The district court likewise rejected the habeas corpus petition, holding that the state court record refuted

4. Sullivan's co-defendant, Carchidi, testified at the hearing that Sullivan strongly desired to take the stand at trial (A. 198a). Carchidi's assertion was not credited by any of the reviewing courts below.

Sullivan's contention that his failure to testify was influenced by any consideration for the other defendants, and that Sullivan himself made the decision because the evidence was insufficient for conviction, and to avoid embarrassment from the revelation of his "past indiscretions" (Pet. App. 5C-8C).[5]

2. *The Decision Not to Present Other Defense Witnesses*

Crediting the hearing testimony of Judge DiBona, the state courts and the federal district court also rejected Sullivan's second argument, that the decision not to otherwise present a defense was influenced by counsel's desire not to disclose evidence and witnesses prior to the co-defendants' trials. On that question, DiBona testified at the state court hearing that once Sullivan made his decision not to take the stand, "there was no other real good evidence that we had, that I thought should be offered" (A. 21a-22a). Judge DiBona further testified that the decision not to present witnesses was jointly made by counsel and Sullivan, that the decision was not in any way predicated upon a desire to protect the co-defendants, and that he saw no conflicts in the defenses of the three accused (A. 38a-39a, 182a).

In ordering that the writ issue, the Third Circuit found that a potential conflict of interest in defense strategy could have influenced the decision not to call witnesses. The court based its decision upon Peruto's assertions that, because he was certain that Sullivan would be acquitted, he had argued against calling defense witnesses to avoid "exposing" those witnesses prior to the pending trials of

5. The State Supreme Court and the district court also found that since Sullivan and the co-defendants were represented by different chief counsel and were tried separately, there was no "dual representation" under the facts of this case (Pet. App. 33D-34D, 472 Pa. at 161-162, 371 A.2d at 483; Pet. App. 4C-5C).

the remaining two co-defendants (Pet. App. 15B-16B; 593 F.2d at 521).[6]

Rejecting the findings of the lower courts that the decision not to present a defense was a legitimate tactical decision based upon Judge DiBona's sound, and untainted, professional judgment, the Third Circuit instead credited Peruto's testimony, holding that "[n]o reason or evidence is offered to explain why an attorney would make the damaging admission of professional impropriety we have quoted were it not true" (Pet. App. 17B; 593 F.2d at 522).[7] The Third Circuit thus concluded that Sullivan had established "a possibility of prejudice or conflict of interest, however remote," and declined to examine the Commonwealth's argument that no actual conflict or prejudice was ever shown (Pet. App. 18B; 593 F.2d at 522)

In its decision, the Third Circuit also referred to the failure to call co-defendant Gregory Carchidi, who was awaiting trial on the murder indictments, as a defense witness for Sullivan. At the evidentiary hearing, some six years after his acquittal, Carchidi stated that he would have testified at Sullivan's trial, but that both attorneys felt his testimony was unnecessary. At the hearing, counsel for Sullivan elicited only that Carchidi would have testified that he and Sullivan were at the union hall with McGrath

6. The Third Ciruit apparently extrapolated this comment by Peruto, directed solely to the decision not to call other witnesses, and applied it to the separate question of Sullivan's decision not to take the stand (Pet. App. 15B-18B; 593 F.2d at 521-522). At the hearing, however, Peruto testified that he had no recollection of the discussion as to whether Sullivan should testify, and speculated only that he might have advised against so doing because that would have been in keeping with his position on the calling of the other witnesses. Peruto never indicated that any conflict influenced his advice regarding Sullivan's decision not to testify (A. 57a-60a.)

7. The Third Circuit also noted that "Sullivan (albeit not a disinterested witness) corroborates his [Peruto's] testimony" (Pet. App. 17B; 593 F.2d at 522).

on the night of the murders, that he did not remember whether he told McGrath to postpone cleaning the hall, and that he had not told McGrath to "Get out of the building and don't say nothing," but recalled saying, " 'Let's get the hell out' or 'Let me get the hell out,' something like that. I don't recall. All I wanted to do was get out." Carchidi also indicated that only one civilian defense witness was presented at his trial (A. 193a-200a).[8]

Although not discussed by the Third Circuit, evidence relating to other alleged potential defense witnesses was presented at the hearing. In particular, Peruto explained that they did not call Detective McGill, who later testified at Carchidi's trial that McGrath had made statements to police inconsistent with his trial testimony, because the judge at Sullivan's trial refused a defense request for discovery of the notes of the detective's interview with McGrath. At Carchidi's trial, a different judge allowed that discovery, thereby enabling defense access to those notes for the first time (A. 47a-48a).[9]

Additionally, Sullivan testified at the hearing that he had advised counsel that Michael Hessian, a union employee and friend of McGrath, would testify at trial that McGrath had previously denied that Carchidi told him to leave the union hall immediately after the shooting (A. 86a-87a). DiBona explained, however, that after he and

8. At the medical examiner's inquest preceding the indictments, Carchidi had asserted the privilege against self-incrimination and refused to answer any questions (A. 204a-209a).

9. After Carchidi's trial, DiBona filed a coram nobis petition seeking reversal of Sullivan's conviction on the basis of the after-discovered evidence of McGill's testimony. The court denied the petition, ruling that the jurors were aware that McGrath had made inconsistent statements (See Notes of Hearing on Defendant's Petition for Writ of Error Coram Nobis, September 20, 1968).

At the hearing, Sullivan agreed that the detective's notes of his interview with McGrath were not discovered until the Carchidi trial (A. 107a).

Peruto spoke to Hessian, they "concluded that he would be of no value to us as a witness" because he was in fear for his life and did not wish to get involved (A. 22a-23a). Peruto corroborated this testimony, noting that "Mr. Hessian was terribly frightened at the time of the Sullivan trial and we didn't want to put on another witness who we could not rely on a hundred percent" (A. 55a-56a). Hessian did not testify at the hearing.[10]

SUMMARY OF ARGUMENT

I. The Sixth Amendment guarantees that a defendant be accorded the effective assistance of counsel. The Third Circuit construed this guarantee far too broadly in concluding that a state habeas petitioner is entitled to relief if he can establish the possibility, however remote, that his attorney was burdened by a conflict of interest. Application of this standard below has resulted in the improper reversal of state convictions for two murders on federal collateral attack. The facts establish that John Sullivan and two co-defendants retained two lawyers to jointly represent them. Each defendant selected a lead counsel of his choice; the other attorney served as backup counsel. Each defendant was tried separately, Sullivan being tried first. No objection

10. Passing references were made to potential testimony regarding the time of death of the victims, which was rendered moot when the medical examiner testified at trial that they could have been killed as early as 7:15 p.m., a revision of his previous estimates setting a later time of death (A. 32a-34a, 61a-62a).

Peruto also testified that an investigator had told him that witnesses at the scene had seen someone drive away after they heard the shots. Although Peruto stated that he feared that those witnesses might testify that they had seen one of the other two co-defendants leaving the union hall, he omitted mention of the possibility that they had instead seen Sullivan (A. 62a-64a). The putative witnesses were not produced at the hearing, and neither Sullivan nor Peruto indicated the relevance of their testimony, or any possibility that their testimony could have benefitted Sullivan.

to joint representation was made pretrial, nor was any conflict apparent from the record. The first allegation of conflict materialized after conviction, pursuant to Pennsylvania collateral review. There, for the first time, backup counsel testified that his advice to present no defense witnesses was influenced by his concern for the co-defendants. This testimony was contradicted by the testimony of lead counsel. Moreover, not one person was shown to have been available as a viable defense witness. The Third Circuit refused to consider this compelling evidence which established that no actual conflict existed, and granted extraordinary relief because the remote possibility of a conflict existed.

The Third Circuit standard requires the unrestricted granting of extraordinary relief. A federal habeas petitioner should be required to establish that an actual conflict of interest existed which violated his Sixth Amendment right to counsel. This approach is consistent with that taken in the vast majority of circuits and states which have addressed the issue. Furthermore, it is consistent with this Court's holding that there is no *per se* constitutional prohibition of joint representation.

That several jurisdictions require trial judges to inquire and to make inquiry of and advise defendants of their "right" to separate counsel and the potential problems created by joint representation is not controlling in this case. The inquiry requirement, even if adopted by this Court, is not constitutionally mandated and is therefore not relevant to this 1967 state trial. In addition, such a requirement only shifts the burden of proof to the state to show that a conflict did not exist. Thus, even if the inquiry requirement were applied to this case, Sullivan would not be entitled to relief because it was established below that no conflict existed.

II. A defendant seeking federal habeas relief must establish that his constitutional rights were violated by state

action. When a defendant is represented by counsel burdened with an actual conflict of interest, a fundamentally unfair trial results and the state action requirement is met. Similarly, if a Sixth Amendment infringement is so apparent that it should have been noticed by the trial court or prosecutor, state action has occurred. No such constitutional violation was even alleged to have occurred below. Neither the trial court nor the prosecutor was on notice of any possibility of conflict. Thus, the speculative conflict alleged was not the result of any action imputable to the state, but rather was created by Sullivan's decision to privately retain the same attorneys who represented his co-defendants. The Third Circuit erred in granting extraordinary relief absent any underlying state action.

III. Even if the Third Circuit's conflict standard is appropriate, the court erred in making its own findings of elemental fact from the record of a state court hearing and that improper finding was critical to the court's decision. The Third Circuit credited and accorded dispositive weight to backup counsel's testimony that he compromised Sullivan's interests at trial in favor of the co-defendants awaiting trial. The court below was bound to review the record consistently with the state court's denial of relief. Consequently, the Third Circuit's ruling could have properly held that backup counsel's testimony was disbelieved by the state hearing court, or that this particular credibility question was not explicitly resolved because it was irrelevant to the state court decision. If not resolved, the Third Circuit was required to remand the case to the district court for an evidentiary hearing. The Third Circuit, however, was not empowered to make *de novo* findings of fact and credibility. Such action was especially unwarranted where the accuracy of the testimony was seriously disputed. Thus, should this Court approve the legal standard followed by the Third Circuit, the case must be remanded for an evidentiary hearing and independent findings by the district court.

ARGUMENT I

THE THIRD CIRCUIT IMPROPERLY VACATED RESPONDENT'S PENNSYLVANIA MURDER AND CONSPIRACY CONVICTIONS UPON ITS FINDING THAT THERE WAS A POSSIBILITY OF CONFLICT OF INTEREST, HOWEVER REMOTE, RESULTING FROM THE JOINT REPRESENTATION OF RESPONDENT AND HIS TWO CO-DEFENDANTS BY THE SAME TWO ATTORNEYS.

A. The Third Circuit granted the writ based upon the possibility that a conflict existed, despite the fact that no actual conflict was shown to exist.

In 1966, respondent John Sullivan and two co-defendants, Gregory Carchidi and Anthony DiPasquale, were charged with murder and criminal conspiracy for the execution-style killings of two people inside a Teamster's Local union hall in Philadelphia. The three defendants, who were each tried separately, were represented by two prominent members of the Philadelphia bar, A. Charles Peruto and G. Fred DiBona. The attorneys were privately retained.[11] Sullivan was tried first and convicted of two counts of first degree murder and criminal conspiracy. The remaining defendants were subsequently separately tried and acquitted.

Since the date of his convictions, Sullivan's case has twice been litigated before the state's highest court. On the second of those instances, the Pennsylvania Supreme Court, after reviewing five days of testimony occasioned by

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11. The exact nature of the retainer, as well as the manner in which Sullivan and his co-defendants happened to retain the same counsel, remains unclear. These matters were not fully developed at the state court hearing; apparently, the funds were raised, at least in part, by friends of the defendants (Pet. App. 10B; 593 F.2d at 518, n.8).

the filing of a petition for collateral relief, rejected Sullivan's claim that he was deprived of his Sixth Amendment right to effective assistance of counsel because of a conflict of interest.

The witnesses who testified at the state court hearing included both counsel, the state trial judge, the Honorable Alexander F. Barbieri, and the prosecutor, Richard A. Sprague. Mr. (now Judge) DiBona, who served as Sullivan's chief counsel, testified that he perceived no conflict of interest among the three defenses of each of his clients, that there were no good defense witnesses available, and that his representation of Sullivan was not compromised in any way by joint representation. However, co-counsel Peruto noted that in deciding whether to put on defense witnesses at Sullivan's trial, one factor which he considered was the advantage to the remaining defendants if defense witnesses were not exposed at Sullivan's trial. Peruto, in retrospect, feared that he was "over-solicitous for the

other two defendants being ready to be tried."[12] The Pennsylvania Supreme Court, in reviewing this testimony,

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12. The critical testimony upon which years of litigation now hinge is as follows:

[BY PERUTO:]

A. Yes. I can recall the great discussions that we had with Sullivan where we were so convinced that—and we communicated this to Sullivan—

THE COURT: When you say great discussions, you mean lengthy discussion?

THE WITNESS: Lengthy discussion, yes, sir. Where we felt that he couldn't possibly be convicted and, therefore, what's the sense in exposing the defense because we had two more defendants to try.

BY [DEFENSE COUNSEL AT POST-CONVICTION HEARING ACT HEARING]:

Q. Wait—

A. And I'm afraid Sullivan suffered by that fact.

Q. Wait just a minute, sir. You were concerned with the other two defendants you represented; is that correct?

A. Yes. Why expose your defense if you've got two more people to come to trial and the Commonwealth has not presented a case?

Q. So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?

A. Sure, it did. When we're talking about back and forth. For example, I've heard Judge DiBona testify today, and, yes, we were sort of playing devil's advocate. I didn't want the defense to go on because I thought we would only be exposing the defendant [sic] witnesses for the other two trials that were coming up. Now on the other hand, you see, the three defendants had already decided between themselves which of us they wanted to be chief counsel. John Sullivan picked Fred DiBona, the other two defendants picked me. So certainly I had to be chief counsel and face the trial of the other two men. And as I look back on that, although it was not my thought that John Sullivan should be short-changed in any fashion, I'm afraid that it was my thought that I was over-solicitous for the other two defendants being ready to be tried (A. 56a-58a).

found the division of responsibility, with regard to the representation of all three defendants, critical to its holding that there was no dual representation "in the true sense of the term."[13]

Sullivan subsequently sought federal habeas corpus relief, alleging, *inter alia*, the denial of his Sixth Amendment right to the effective assistance of counsel. This claim was rejected by the district court which, after independently examining the state court record, accepted the Pennsylvania Supreme Court's conclusion that there was no dual representation (Pet. App. 4C-8C).

The Third Circuit thereafter reversed the district court, and the two state court decisions, and granted the petition for a writ of habeas corpus upon concluding that the representation of the three defendants by two privately retained counsel violated Sullivan's Sixth Amendment right to effective assistance of counsel.

In reviewing the record for Sixth Amendment purposes, the Third Circuit applied the following standard:

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13. In relevant part, the Pennsylvania Supreme Court stated: [T]he testimony establishes that there was no dual representation in the true sense of the term, i.e., the same counsel actively represented co-defendants. Mr. Peruto testified that it was Mr. (now Judge) DiBona who served as chief counsel for appellant during trial and made all decisions relevant to Sullivan's defense while he, Peruto, was merely assisting. These functions were reversed at the trial of the co-defendants where Mr. Peruto was chief counsel and Judge DiBona the assistant. Thus, Judge DiBona served only a minor role in the trial of the co-defendants while devoting his primary efforts to the Sullivan case. This conclusion is supported by Judge DiBona's statements that his stewardship was in no way affected by the consideration of the co-defendant's cases but was solely a product of what he considered to be the best course in his representation of Sullivan. We therefore hold that there is absolutely no evidence that a conflict existed.

(Pet. App. 33D-34D; 472 Pa. at 161-162, 371 A.2d at 483) (emphasis added).

> [R]epresentation of co-defendants by the same attorney is not tantamount to the denial of effective assistance of counsel guaranteed by the sixth amendment. There must be some showing of a possible conflict of interest or prejudice, however remote, before a reviewing court will find the dual representation constitutionally defective. [Quoting *Walker v. United States*, 422 F.2d 374, 375 (3d Cir.) (per curiam), *cert. denied*, 399 U.S. 915 (1970).]
>
> . . . [A]ctual prejudice or conflict of interest need not be shown. The mere possibility, however remote, is sufficient.

(Pet. App. 12B-13B; 593 F.2d at 519-520) (footnote omitted).

This standard is not consistent with basic principles of habeas review and impermissibly intrudes on the state court judgment. A state prisoner seeking habeas relief, who first raises his conflict of interest claim *post-trial*, should bear an extraordinarily heavy burden in order to establish the validity of his claim.[14] However, as this case amply demonstrates, the Third Circuit has effectively created a

14. This Court has expressly indicated that federal habeas review of state convictions is reserved for only the very gravest allegations and that state prisoners are entitled to federal habeas relief only *upon proof* that their detention violates the Federal Constitution. *Townsend v. Sain*, 372 U.S. 293, 312 (1963).

constitutional presumption that joint representation in criminal cases is improper.[15]

The Third Circuit, in rejecting the decisions of both the Pennsylvania Supreme Court and the district court, found that there were sufficient indices of participation by Peruto to warrant a conclusion of joint representation (Pet. App. 12B; 593 F.2d at 519). Under the circuit's standard of review, little more than that need be shown to obtain relief.[16] Thus, once Peruto speculated, in retrospect, that he *may* have considered the interest of the co-defendants during Sullivan's trial, "the possibility of a conflict, however remote," standard was virtually met. According to the Third Circuit, the Peruto testimony mandated the conclusion that his influence on the decisions not to present defense witnesses, not to have Sullivan testify, and not to call co-defendant Carchidi were all tainted by a possible

15. The Third Circuit's standard of review may realistically eliminate joint representation in the Circuit. Certainly, any state court which allows such representation proceeds at great risk. *See Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) (dissenting opinion of Powell, J.).

Moreover, although *Walker v. United States*, 422 F.2d 374, initially articulated the "possibility of conflict, however remote," standard in 1970, the full effect of its application to individual cases was not immediately apparent. No prior decision by or within the Third Circuit involved facts sufficiently similar to those presented in this case so that it could have been anticipated how broadly the rule could or would be applied. Further, one district court within the Third Circuit's jurisdiction commented in 1976 that "the Third Circuit standard . . . can be charitably characterized as difficult to apply . . ." *United States ex rel. Morgan v. Keve*, 425 F.Supp. 585, 588 (D. Del. 1976).

16. The divergent approaches to the conflicts problem, which have been adopted by other circuits and states, are set forth as an addendum at the conclusion of the brief. The Third Circuit standard of review for state conflict cases reflects one of the most stringent interpretations of the Sixth Amendment right to counsel and, therefore, places a relatively minimal burden on the habeas petitioner to establish a violation of that right.

conflict of interest, however remote. As a consequence, issuance of the writ was compulsory.[17]

The central problem with the Third Circuit's analysis and Sullivan's conflict claim is that no real alternatives were shown to exist which counsel actually overlooked. Sullivan has never made a claim, nor can he, that his case was not properly investigated or prepared because of an alleged conflict. Rather, the conflict is alleged to have materialized at the close of the state's case and concerned the question of whether a defense should be presented.[18] The Third Circuit noted that, had independent counsel decided not to present any defense, the court would have had little doubt that this would have been a sound tactical decision (Pet. App. 15B; 593 F.2d at 521). Further, that court ignored the fact that no defense evidence which would have had any bearing on guilt was ever shown to exist which could have been presented at Sullivan's trial. Indeed, at the state hearing on this issue, with the exception of the testimony which co-defendant Carchidi claimed he would have given at Sullivan's trial, there is nothing of record to indicate what defense witnesses could have been

17. The Third Circuit stated, in relevant part:

> Our examination of the record convinces us that there is in this case *at least a possibility of prejudice or conflict of interest and that independent counsel might well have chosen a different trial strategy*. Therefore, prior decisions of this court compel reversal.

(Pet. App. 15B; 593 F.2d at 521) (*emphasis added*).

18. For purposes of this argument, the veracity of the relevant portions of Mr. Peruto's testimony as to this point will be assumed; the question of the validity of that "finding of fact" is reserved for Argument III, *infra* at 42-46.

called, what they would have said, or whether they were available to testify either in 1967 or now.[19]

It is significant that the Third Circuit did not specifically credit Carchidi's 1974 testimony that he would have testified at Sullivan's trial if he had been called. Rather, since Carchidi was then under indictment and awaiting trial for the same crimes,[20] the court concluded that joint counsel were under conflicting duties: Sullivan needed to call Carchidi but counsel would not allow Carchidi to testify.[21] This alleged conflict is illusory. No defense attorney would have allowed Carchidi to testify at Sullivan's trial. Carchidi could not have risked testifying with murder charges pending against him. Thus, Carchidi simply was not an available witness at the time of Sullivan's trial, and the claim that he should have been called as a witness for Sullivan ignores reality. Conflict cannot be predicated on a claim that counsel did not engage in a futile exercise. *See, e.g., United States v. Martorano,* 457

19. In the statement of the case, we have described the allegedly available evidence that Sullivan theorized might have been presented in his defense. The Third Circuit mentioned only Carchidi and three witnesses who were outside the union hall. As to the latter three, Peruto indicated his reluctance to call them because they might have seen one of the co-defendants leaving the union hall (Pet. App. 16B; 593 F.2d at 521). However, no one, including Peruto, indicated how these witnesses, who were not called at the state court hearing, could have helped Sullivan.

20. Carchidi had previously invoked the Fifth Amendment at the Coroner's Inquest (A. 204a-205a) and testified that the only people with whom he had discussed the case were his two attorneys (A. 199a-200a).

21. The Third Circuit noted that, during Sullivan's trial, Peruto, in another context (regarding the admissibility of an out-of-court declaration by Carchidi), argued that Carchidi could not be called as a witness (Pet. App. 18B-19B; 593 F.2d at 522-523).

F.Supp. 803, 808-809 (D. Mass. 1978), which rejected a similar claim.[22]

Moreover, a close scrutiny of Carchidi's hearing testimony indicates that he would not have been a helpful witness for Sullivan since he would have effectively placed Sullivan in the building at the time of the killing (A. 195a-196a), and Carchidi barely, if at all, discredited McGrath. Thus, no witnesses existed who would have actually helped Sullivan; this is precisely what Judge DiBona indicated in the course of his testimony (A. 21a-22a).

Next, there is the question of Sullivan's decision not to testify. A careful reading of Peruto's testimony makes it clear that neither he nor DiBona had any conceivable conflict in advising Sullivan on this strategical question. Peruto could not even remember which position he advocated, although DiBona recalled that he (DiBona) wanted Sullivan to testify and Peruto played the "devil's advocate." Peruto never indicated, nor is there any basis from which to conclude, that Sullivan's decision not to testify had any connection, however remote, with Peruto's alleged concern for the co-defendants. In relevant part, Peruto testified as follows:

> A. *And you know, I'm not even sure now which of the two of us was pushing for him to testify or was pushing the other way.* I'm even mixed up on that. But I do recall that Fred DiBona felt that there was not enough

22. There, the court noted:

> [I]f separate attorneys had represented [appellant] and [co-defendant], then there would have been no way that [appellant] could have required [co-defendant] to relinquish his Fifth Amendment right to stay off the witness stand. Therefore, [appellant] could not possibly have been prejudiced by joint representation as far as [his co-defendant's] testimony is concerned, because he would not have been able to demand and obtain such testimony even had he been represented by a separate lawyer.

United States v. Martorano, 457 F.Supp. at 808-809.

> for it to go to the jury in the first place to result in a conviction. . . .
>
> Q. Well, Judge DiBona said that he urged the defendant to take the witness stand.
>
> A. Well, if that's his recollection, I'll have to say I can't refute it in my recollection.
>
> Q. Well, I want to know if it was you who urged him not to testify. . . .
>
> The Witness: Since I don't recall, I'll put it this way: Which of the two of us urged him to testify or did not, or whether I did it as a result of being sort of a devil's advocate—I represent him regularly, Judge—I would say that I would accept Judge DiBona's recollection. *And it does seem to my recollection more in keeping with what I would have done because of the other two defendants yet to testify.*

(A. 59a-60a) (emphasis added).[23]

Thus, it is clear from the record that there was no actual conflict of interest. Peruto's claim is little more than a hindsight belief that another strategy might have worked better.[24] DiBona perceived no conflict of interests problem and Peruto's vague claim of conflict simply does not bear up under close examination. Nevertheless, the Third Cir-

23. Sullivan denied that he made the ultimate decision not to testify (A. 138a). Sullivan's own testimony is largely inconsistent with several of the points made in the testimony of Peruto and DiBona. The state evidentiary hearing court found that Sullivan himself decided not to testify after consulting with counsel (Pet. App. 7F), and therefore credited the DiBona-Peruto version of the events.

24. Hindsight strategical laments hardly equate to constitutional violations. *United States v. Foster*, 469 F.2d 1, 4 (1st Cir. 1972).

cuit refused to examine the record to see if an actual conflict existed, stating:

> The contention that there were no witnesses whose testimony would have been useful requires us to speculate as to what witnesses who have never testified, some of whom are now deceased, would have said and whether independent counsel would have used their testimony. This we cannot do.

(Pet. App. 20B; 593 F.2d at 523).[25] Accordingly, the flaw in the "possibility of conflict, however remote" test thus becomes abundantly clear: the remoteness aspect mandates Sixth Amendment relief being granted on the hypothetical basis that an independent attorney might have presented defense witnesses although, as a matter of fact, none existed.

B. This Court's prior decisions, as well as the weight of other available authority compel the use of an "actual conflict" test when a conflict of interest is first raised post-trial.

In reviewing the viability of the standard of review adopted by the Third Circuit, three prior decisions by this Court are unquestionably relevant: *Holloway v. Arkansas*, 435 U.S. 475 (1978), *Dukes v. Warden*, 406 U.S. 250 (1972), and *Glasser v. United States*, 315 U.S. 60 (1942). *Glasser* was a joint representation case where, as trial commenced, the trial court, *over objection*, appointed Glasser's retained counsel to represent a co-defendant as well. There, a Sixth Amendment violation was found because the trial court, *over objection*, ordered joint representation of defendants with conflicting interests. In *Holloway*, the trial court, although repeatedly advised by

25. Interestingly, there is no record proof of any witnesses being deceased (*see Argument* III, *infra* at 45, n. 50).

defense counsel of the disparate interests of the three defendants for whom he was appointed, nevertheless and again *over objection* ordered counsel to represent them at a joint trial. There, this Court held that requests for appointment or retention of separate counsel prior to trial because of possible conflicts must be granted subject only to the trial court's power to explore "the adequacy of the basis of defense counsel's representation's regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client." *Holloway*, 435 U.S. at 487 (footnote omitted).[26]

Thus, where a *pre-trial* request is made for the appointment of separate counsel and is *improperly* denied, this Court has held that reversal is virtually automatic ("We read . . . *Glasser* . . . as holding that whenever a trial court improperly requires joint representation over timely objection reversal is automatic," *Holloway*, 435 U.S. at 488). This Court also held that a harmless error analysis could not be considered in these circumstances.

In *Dukes*, 406 U.S. 250, this Court had occasion to review the decision of the Connecticut Supreme Court denying Dukes' request for state habeas relief. Although this Court's opinion did not extensively address the conflict of interest issue,[27] the Court did affirm the Connecticut Supreme Court's holding that, because no actual conflict existed which motivated the guilty plea, Dukes was not entitled to relief. Since *Dukes*, unlike *Glasser* and *Hollo-*

26. The Court did note that, since *Glasser* was decided, courts have taken diverse approaches in joint representation cases where counsel does not advise the trial court of potential or actual conflict. Those questions, however, were not reached. 435 U.S. at 484.

27. Dukes was seeking to overturn his guilty plea based on the alleged conflict. This was raised for the first time after he had previously lost on direct appeal and federal habeas corpus on other theories. 406 U.S. at 250-251. The focus of this Court's opinion is more on the guilty plea than the conflict issue.

way, was a collateral review case, it does appear, at least inferentially from *Dukes*, that for collateral review cases, this Court has approved a state requirement that the defendant show actual conflict.

In any event, the instant case is factually distinct from *Glasser* and *Holloway*. In the case *sub judice*, no objection to the form of representation was raised prior to trial, and the challenged representation involved was made by privately retained counsel and not court-appointed counsel. In addition, all defendants received *separate* trials, and no factual basis is apparent from the record to conclude that the trial court should or could have been aware of any possibility of conflicting interests either before or during Sullivan's trial.

Despite these countervailing factors, the Third Circuit applied a standard for collateral attack that is barely distinguishable from the prophylactic approach used when the issue is raised pre-trial. Given that the one principle which emerges clearly from *Glasser* is that joint representation is not *per se* unconstitutional under the Sixth Amendment, the Third Circuit approach cannot be appropriate. There is presently no Sixth Amendment right to separate counsel, nor is there a recognized presumption that joint representation is improper *in all circumstances*.[28] Indeed, even in the *Holloway* situation, this Court allowed trial courts the latitude to inquire, pre-trial, into the *adequacy of the basis for a claimed conflict* before the court decides to honor a request for separate counsel. *Holloway*, 435 U.S. at 487.

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28. Several distinct advantages may exist in joint representation. The united front approach can insulate the defendants from being set against each other and also prevent the prosecutor from negotiating for testimony. Indeed, in some instances, the government may seek to prevent one attorney from representing multiple defendants. *Pirillo v. Takiff*, 462 Pa. 511, 341 A.2d 896 (1975), *cert. denied*, 423 U.S. 1083 (1976).

Given the prerequisite that some basis for the conflict be established in the pre-trial setting, it must be concluded that where, as here, the conflict is first claimed *post-verdict*, a defendant must show substantially more than a "possibility, however remote," that a conflict existed before a Sixth Amendment violation can be found.[29]

Should this Court accept this contention that the Third Circuit standard of review is neither constitutionally mandated nor justified, the problem remains of determining what standard of review should be employed to resolve post-verdict claims of improper joint representation on the basis of conflict of interests.[30] As the Court noted in *Hollo-*

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29. It is frequently noted that it is difficult to assess the precise degree of prejudice actually suffered in a conflict situation. *Glasser v. United States*, 315 U.S. at 75-76. This is often a point advanced in favor of granting relief liberally in conflict cases. However, where the objection is first made on collateral review, the vagaries of conflict also operate in favor of a defendant. Imagined conflicts can be easily conjured up and the motive to do so is obvious. Mr. Justice Frankfurter discussed this problem in his dissent in *Glasser*:

> It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record. . . . Not until twenty weeks after Stewart had become counsel for the co-defendant Kretske, and fifteen weeks after the trial had ended, did Glasser discover that he had been deprived of his constitutional rights. This was obviously a lawyer's afterthought. It does not promote respect for the Bill of Rights to turn such an afterthought into an imaginary injury that is reflected nowhere in the contemporaneous record of the trial and make it the basis for reversal.

315 U.S. at 88-89.

30. Should the Court adopt the Third Circuit standard, the petitioner would still seek a remand for further proceedings. *See* Argument III, *infra*. There is, however, no argument being advanced that the Third Circuit misapplied its own legal standard to the facts as it found them.

way, courts have differed in their approach to the problem. Not only are differing standards employed by different courts, but the presence or absence of several factors may or may not alter their analysis: *e.g.*, the type of joint representation;[31] the status of counsel as appointed or privately retained; whether the trial court has an affirmative duty to inquire pre-trial regarding possible conflicts; whether the court did so inquire; whether the defendant was warned of the "right" to separate counsel and whether he waived it; and whether the court should have been on notice of a conflict, even if there was no duty to inquire and no objection raised.

This Court need not necessarily resolve all joint representation questions or devise a single standard to cover all conceivable situations to decide this case. It is submitted, however, that, *at the least*, in state joint representation cases, where defendants are tried separately, where counsel is privately retained and does not alert the court to any potential conflicts, either pre-trial or at trial, and where no potential conflicts are apparent from the trial record, *a heavy burden should be placed on defendants before relief is granted post-trial.*

Specifically, a convicted defendant should be required to show that an actual or real conflict of interest existed; that is, a conflict which actually prevented counsel from

31. The decisions do not even agree on the precise definition of joint representation. As previously indicated, a definitional distinction was drawn between jointly and separately tried defendants by the Third Circuit judges who voted for reargument *en banc* (Pet. App. 3A-4A; 593 F.2d at 525).

competently representing his clients' interests.[32] This standard is justified for several reasons: the convicted defendant has obvious reasons to fabricate conflicts in order to avoid criminal sanctions; the failure of counsel to avoid the conflict pre-trial, in accordance with his professional obligation,[33] is *prima facie* evidence that no *real* conflict of interest existed; the attorney post-verdict may not have lost his adversarial interest in his client and vague claims of potential conflict will suddenly surface. *See, e.g., Loukas v. Johnson,* 453 F.2d 407 (6th Cir. 1972); *Commonwealth v. Napper,* 254 Pa. Super. Ct. 54, 385 A.2d 521 (1978). Additionally, in this case, the potential for inherent, but not articulable, prejudice is far less because the defendant was tried separately and was repre-

32. All commentators have noted the degree of confusion and the definitional problems which have been created as lower courts have struggled with conflict questions *See generally* Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases,* 67 Geo. L.J. 1075 (1979); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal,* 64 Va.L.Rev. 939 (1978); Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney,* 62 Minn.L.Rev. 119 (1978); Wanat, *Conflicts of Interest in Criminal Cases and the Right to Effective Assistance of Counsel —The Need for Change,* 10 Rut.-Cam. L.J. 57 (1978); Comment, *Conflicts of Interests in Multiple Representation of Criminal Co-Defendants,* 68 J. Crim. L.&C. 226 (1978); Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache,* 5 Hofstra L.Rev. 315 (1977); Note, *Ensuring Effective Assistance of Counsel for the Criminal Co-Defendant,* 37 La.L.Rev. 1289 (1977). This brief does not advocate a separate showing of prejudice once a conflict is shown to exist. However, given that an actual or real conflict standard is advocated in this case, this distinction may be only semantic. Additionally, because the state's case was circumstantial, a harmless error argument is not presented in this case. However, there is no reason for harmless error to be generally rejected, as it was in *Holloway*. in cases where the defendant does not object to joint representation pre-trial.

33. ABA Code of Professional Responsibility DR 5-105.

sented by retained counsel of his own choice. Under such circumstances, establishing an actual or real conflict of interests is not so inherently difficult as to unreasonably preclude avenues for relief.

The standard advocated herein is not novel. Several circuits also require that, in joint representation cases, a *real* conflict of interests be shown.[34] *See, e.g., United States v. Foster*, 469 F.2d 1 (1st Cir. 1972) (defendant did not show any prejudice from joint representation); *Kaplan v. Bombard*, 573 F.2d 708 (2d Cir. 1978) (defendant must show some specific instance of prejudice, some real conflict of interest); *United States v. Carrigan*, 543 F.2d 1053 (2d Cir. 1976) (real conflict of interest and prejudice present since each defendant gave different version of incident to police and defendant's trial testimony was in conflict with co-defendant's statement, which was also admitted at trial); *United States v. Atkinson*, 565 F.2d 1283 (4th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) (defendant must show some specific instance of prejudice and some real

34. Some of these jurisdictions may, in varying degrees, shift the burden of proof to the state, if there was no pre-trial "inquiry" into the conflicts question. The applicability of the "inquiry" requirement will be discussed separately. However, the *dissent* in *Holloway* is noteworthy at this point because of the conflict standard suggested there. In that dissent, it was agreed that a pre-trial request for separate representation should trigger an inquiry by the trial judge. The dissenters, however, would not have applied prophylactic relief in the absence of an inquiry after a request for separate counsel. Rather, if a timely request for separate counsel was denied without a hearing, the burden would shift to the government "to establish the improbability of prejudice," 435 U.S. at 495-496, but "the record must offer some basis for a reasonable inference that 'conflicting interests' hampered a potentially effective defense." 435 U.S. at 496. This standard is not dissimilar from that advocated in this pre-trial "silent record" case where there is neither a request for separate counsel nor an inquiry.

conflict of interest); *Haggard v. Alabama*, 550 F.2d 1019 (5th Cir. 1977) (defendant must show actual prejudice); *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975) (actual prejudice exists as to minimally involved defendant since plausible defense of shifting blame to co-defendants foreclosed by joint representation); *Thacker v. Bordenkircher*, 590 F.2d 640 (6th Cir.), *cert. denied*, 99 S. Ct. 2827 (1979) (defendant must show that there was a conflict of interest and that he was prejudiced thereby; the establishment of mere potential conflict arising from joint representation is not sufficient to constitute violation of the Sixth Amendment); *United States v. Woods*, 544 F.2d 242 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977) (defendant must show actual prejudice); *United States ex rel. McClindon v. Warden*, 575 F.2d 108 (7th Cir.), *cert. denied*, 439 U.S. 856 (1978) (defendant must show that a conflict of interest existed in fact); *United States v. Mandell*, 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976) (defendant must show with a reasonable degree of specificity that a conflict of interest actually existed at trial); *Davidson v. Cupp*, 446 F.2d 642 (9th Cir. 1971) (defendant must show specific prejudice in order to prevail); *Watkins v. Wilson*, 408 F.2d 351 (9th Cir. 1969) (defendant must demonstrate that some specific prejudice resulted from the joint representation); *Fryar v. United States*, 404 F.2d 1071 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969) (defendant must show that prejudice resulted from the joint representation).

The Eighth Circuit Court of Appeals requires a showing of actual prejudice or a *substantial possibility* of a conflict of interest. *Austin v. Erickson*, 477 F.2d 620 (8th Cir. 1973); *Beran v. United States*, 580 F.2d 324 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 1422 (1979) (defendant must show that there was an actual conflict of interest or a substantial possibility of such a conflict).

C. The presence or absence of a pre-trial judicial inquiry is not constitutionally significant in this case.

The delineation of the proper standard to be employed is complicated by the subsidiary question of the need for a pre-trial judicial inquiry. Many courts now find significant, in any post-verdict review of a Sixth Amendment challenge, the absence or presence of a thorough pre-trial inquiry, by the trial court, into potential conflicts of interest. The presence of such an inquiry may signify a waiver by defendant of the Sixth Amendment claim. In most jurisdictions where inquiry is required, its presence or absence will determine where the burden of proof will lie—with the defendant or the government—if there is a post-verdict challenge. *See generally United States v. Lawriw*, 568 F.2d 98 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978).

Proposed Fed. R. Crim. P. 44(c), now being considered by Congress,[35] would require trial courts to make pre-trial

35. Proposed Rule 44(c) reads as follows:

Rule 44. Right to and Assignment of Counsel

. . .

(c) JOINT REPRESENTATION. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

On April 30, 1979, this Court promulgated Rule 44(c) as an amendment to the Federal Rules of Criminal Procedure, effective August 1, 1979. The effective date was postponed (93 Stat. 326) until expressly approved or December 1, 1980, whichever is earlier. The Advisory Committee Comment to Rule 44(c) appears at 77 F.R.D. 507, 594-604 (1978).

inquiries, and to take corrective measures, unless there is little likelihood that a conflict problem would arise. 77 F.R.D. at 594.[36] The proposed rule reflects the conclusion reached by many courts that the most efficacious way to deal with the "conflict" problem is to avoid it pre-trial, either by securing the defendants' waiver of any Sixth Amendment claim, or by ordering that separate counsel enter the case. Although there are arguments which can be made to suggest that this approach may be less than a perfect solution to the problem, that discussion is not relevant herein.[37] Rather, the more immediate question is whether the failure to inquire, prior to a 1967 Pennsylvania

36. The American Bar Association Project on Standards For Criminal Justice has recently amended the Standards to provide that defendants must give informed consent to joint representation and that the consent must be made a matter of judicial record. ABA Standards Relating to the Administration of Criminal Justice — *The Defense Function*, Standard 4-3.5 (Conflict of Interest) (Approved Draft, February 12, 1979). The relevant standard, in effect when *Holloway* was decided (ABA Standards Relating to the Administration of Criminal Justice—*The Function of the Trial Judge*, §3.4(b), (Approved Draft 1972)), which required judicial inquiry into potential conflict, has been suspended. (*See* ABA Standards Relating to the Administration of Criminal Justice—*Special Functions of the Trial Judge*, Derivation Table (Approved Draft 1978)).

37. In fact, if applied prospectively, an inquiry rule will help to insulate convictions from collateral attack. Thus, from that viewpoint, the inquiry rule may be desirable. However, this does not make the inquiry requirement a matter of constitutional mandate.

state trial. is legally significant in a federal habeas corpus proceeding.[38]

An automatic inquiry requirement was certainly not in effect in Pennsylvania or the Third Circuit in 1967 when Sullivan was tried.[39] Further, it is submitted that, since the concept and legal philosophy embodied in Rule 44(c) should be deemed strictly supervisory and not of constitutional dimension, it should not apply to this 1967 case.[40]

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38. It may be argued that some inquiry is constitutionally necessary where a potential conflict becomes apparent to the trial judge (*see, e.g., United States v. Mandell*, 525 F.2d at 677) or where counsel is appointed by the court. Those issues are not present here as counsel was privately retained and no potential conflict was apparent prior to or during trial. Whether an inquiry requirement in *all* cases has constitutional underpinnings and is, therefore, applicable to state court proceedings has not been extensively discussed by the courts. *See LaFleur v. Hall*, 383 F.Supp. 1188, 1190, n.3 (D. Mass. 1974) (noting that court's supervisory rule requiring an inquiry is not binding on the state court); *Salomon v. LaVallee*, 575 F.2d 1051, 1055 (2d Cir. 1978) (where the court specifically reserved decision on whether the court's supervisory rule, requiring an inquiry by the trial court and the attendant shift in the burden of proof absent a satisfactory inquiry, would apply to a review of state court convictions). *But see Colon v. Fogg*, 603 F.2d 403 (2d Cir. 1979) (where the court, without discussion of the issue, reversed the district court's order and ruled that the state failed to meet its burden of disproving prejudice).

39. The possibility of conflict, however remote, standard was first adopted in the Circuit in 1970 (*Walker v. United States*, 422 F.2d at 375). In 1973, the Third Circuit discussed pre-trial inquiry and declined to adopt a *per se* rule requiring it, preferring instead to use the standard applied herein (*United States ex rel. Hart v. Davenport*, 478 F.2d 203, 210 (3d Cir. 1973)). Ironically, the authorities cited in support of the standard from other circuits do not indicate that those circuits use the "possibility, however remote," standard.

40. Even a Rule 44(c) violation would not carry with it the mandatory reversal requirement of Fed.R.Crim.P. 11. *See* 77 F.R.D. at 603. Moreover, this Court has recently held that a formal violation of Rule 11 is not cognizable on habeas corpus. *United States v. Timmreck*, 99 S.Ct. 2085 (1979).

The Sixth Amendment guarantees the right to the effective assistance of counsel; however, the additional conclusion that joint representation of defendants is presumptively violative of the constitutional right to effective counsel is simply unwarranted. As this Court recognized in *Glasser* and *Holloway*, joint representation is not *per se* violative of the Sixth Amendment right. Hence, there is no *per se* Sixth Amendment right to *separate* counsel. Thus, any requirement that the court inquire pre-trial and advise the defendant of the "right" to separate counsel should be supervisory and not of constitutional dimension.[41]

Thus, the Commonwealth submits that the Third Circuit standard should not be applied to the facts herein nor should any "inquiry" factor be significant. Rather, at the least, in a 1967 state trial, a defendant initially objecting to joint representation after conviction must establish the presence of an actual or real conflict of interest, as previously defined, before federal habeas corpus relief should be considered. Indeed, if this standard is adopted, the record herein would not be sufficient to justify giving Sullivan relief regardless of which side bears the burden of proof. The record establishes no conflict. Rather, at most, there is an attorney's and a defendant's lament that they lost and that, maybe, if they had another chance, they would win. This is simply not a basis for granting a writ of habeas corpus.

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41. As to this point, a comparison with *Boykin v. Alabama*, 395 U.S. 238 (1969), and guilty pleas is illustrative. There, the Court held that it would not presume a defendant's waiver of the important federal rights which are relinquished upon the entry of a guilty plea *from a silent record*. 395 U.S. at 243. However, as the Court made clear, to reach that holding and require an inquiry, there had to be an underlying constitutional right being relinquished. Thus, here, unless a Sixth Amendment right to separate counsel is found to exist, the inquiry requirement cannot be deemed to be a constitutional requirement.

ARGUMENT II

BECAUSE THE SIXTH AMENDMENT VIOLATION ALLEGED BELOW WAS NOT CAUSED OR FOSTERED BY STATE ACTION, THE THIRD CIRCUIT ERRONEOUSLY FOUND THAT VIOLATION TO BE AN APPROPRIATE GROUND FOR ISSUING THE WRIT OF HABEAS CORPUS.

A defendant seeking federal habeas corpus relief must demonstrate that an alleged constitutional violation was caused by the state.[42] Because the putative Sixth Amendment violation here was not even arguably an action of the state, the Third Circuit erroneously granted the writ.

Federal habeas review is extraordinary; it was not intended that the federal judiciary review all criminal convictions arising from the state courts.[43] A Sixth Amend-

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42. It is fundamental that the Constitution exists to protect individuals from actions of the state. *See generally* Farrand, 1 Records of the Federal Convention of 1787, 132 *et seq.* (1966). Consequently, this Court has held that no infringement of constitutional rights will generally be found absent state action which caused the violation. *See, e.g., Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155 (1978) ("[M]ost rights secured by the Constitution are protected only against infringements by governments.").

43. Habeas Corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review.

Williams v. United States, 401 U.S. 675, 682-683 (1971) (Harlan, J., concurring) (emphasis in original). This limited scope of habeas review conforms to well-settled principles of federalism by which the federal judiciary largely defers to the legislative and judicial determinations of the states. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 126-127 (1973); *Labine v. Vincent*, 401 U.S. 532, 537-539 (1971); *Powell v. Texas*, 392 U.S. 514, 535 (1968); *Duncan v. Louisiana*, 391 U.S. 145, 148-149 (1968); *Thacker v. Bordenkircher*, 590 F.2d 640, 641 (6th Cir.), *cert. denied*, 99 S.Ct. 2827 (1979).

ment claim alleging a conflict is meaningless unless it can also be shown that the state was in some way responsible for the infringement. When counsel is appointed to represent co-defendants, the state action is obvious; the state quite literally ordered the joint representation. If, however, counsel is retained by the defendant, state action is not automatically implicated, because the defendant himself, not the state, created the joint representation. Thus, the distinction between retained and appointed counsel does not arbitrarily curtail habeas review solely on the basis of a defendant's financial situation. *See United States ex rel. Hart v. Davenport*, 478 F.2d 203, 211 (3d Cir. 1973).[44] Of course, the mere fact that counsel is retained does not end the inquiry, as there are two additional possible predicates for federal habeas review. If the state court or state prosecutor precipitated the alleged

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44. The concept that the general effectiveness of retained and appointed counsel should be evaluated differently is well settled. *See United States v. Rodriquez Vallejo*, 496 F.2d 960 (1st Cir.), *cert. denied sub nom. Vallejo v. United States*, 419 U.S. 965 (1974); *United States v. Bubar*, 567 F.2d 192 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977); *Root v. Cunningham*, 344 F.2d 1 (4th Cir.), *cert. denied*, 382 U.S. 866 (1965); *Lacaze v. United States*, 457 F.2d 1075 (5th Cir.), *cert. denied*, 409 U.S. 921 (1972); *Loukas v. Johnson*, 453 F.2d 407 (6th Cir. 1972); *Plaskett v. Page*, 439 F.2d 770 (10th Cir. 1971); *United States v. Riebold*, 557 F.2d 697 (10th Cir.), *cert. denied*, 434 U.S. 860 (1977); *Williams v. Estelle*, 416 F. Supp. 1073 (N.D. Tex. 1976); *Kallie v. Beto*, 353 F. Supp. 966 (S.D. Tex. 1973), *aff'd sub nom. Kallie v. Estelle*, 515 F.2d 588 (5th Cir.), *cert. denied*, 423 U.S. 1019 (1975); *Williams v. United States*, 304 F. Supp. 691 (E.D. Mo. 1969); *Shaw v. Henderson*, 303 F. Supp. 183 (E.D. La. 1969), *aff'd*, 430 F.2d 1116 (5th Cir. 1970); *Opie v. Meacham*, 293 F. Supp. 647 (D. Wyo. 1968), *aff'd*, 419 F.2d 465 (10th Cir. 1969), *cert. denied*, 399 U.S. 927 (1970). For state decisions, *see* Annot., 74 A.L.R. 2d 1384, 1406 §5. With respect to Sixth Amendment claims involving an allegation of a conflict of interest, a smaller number of courts draw this distinction. *See* Addenda I and I'

conflict, or did nothing to mitigate a conflict of which they should have been aware, the requisite state action has occurred for Sixth Amendment purposes. In addition, state action as well as a due process violation will be found if the defendant shows that the state proceedings were "fundamentally unfair" because his retained attorney was burdened by an *actual* conflict of interest.

This analysis has been followed by the Fifth Circuit for several years. *See, e.g., Fitzgerald v. Estelle*, 505 F.2d 1334, 1337 (5th Cir. 1974), *cert. denied*, 422 U.S. 1011 (1975); *Foxworth v. Wainwright*, [illegible] F.2d 1072 (5th Cir. 1975).[45] In adopting this standard, the Fifth Circuit has effectively and properly balanced the competing interests at work in the administration of criminal justice.

The Third Circuit has rejected the approach articulated by the Fifth Circuit in *Fitzgerald*. *United States ex rel. Hart v. Davenport*, 478 F.2d at 210. Although it purported to acknowledge the necessity of state action, the *Hart* court held that the state action requirement is automatically met whenever a conflict occurs during a criminal proceeding and no inquiry is made by the trial court or prosecutor.

The Third Circuit's approach, unlike that of the Fifth Circuit, ignores many of the interests central to the administration of justice as well as the fundamental differences

45. *See also United States v. Bosch*, 584 F.2d 1113, 1123 n.7 (1st Cir. 1978); *Garton v. Swenson*, 497 F.2d 1137, 1139 n.4 (8th Cir. 1974); *People v. Cook*, 13 Cal. 3d 663, 119 Cal. Rptr. 500, 532 P.2d 148, *cert. denied*, 423 U.S. 870 (1975); *People v. Gomberg*, 38 N.Y. 2d 307, 397 N.Y.S. 2d 769, 342 N.E. 2d 550 (1975); *State v. Jeffrey*, 162 Mont. 92, 515 P.2d 364 (1973).

between retained and appointed counsel.[46] For instance, a defendant who hires counsel can carefully search for an attorney whose abilities are especially suitable to the tasks at hand. An indigent has no choice; he must accept whomever is appointed, regardless of the lawyer's ability. More important, retained counsel can be fired if the client is at all dissatisfied with his performance. An indigent, however, must present compelling reasons before counsel will be replaced. *See United States v. Rodriguez Vallejo*, 496 F.2d 960 (1st Cir. 1970). Because an indigent defendant has not employed his attorney, and so may be unable to take steps that will ensure satisfactory performance, closer scrutiny of court appointed counsel is necessary. *Commonwealth v. Myers*, 472 Pa. 200, 209, 371 A.2d 1279, 1283 (1977); *Commonwealth v. Williams*, 457 Pa. 502, 508-509, 327 A.2d 15, 18 (1974). In addition, the *Fitzgerald* standard lends integrity to the truth-determining function central to any prosecution:

> Ordinarily, a defendant who retains counsel of his own selection is responsible if that counsel does not faithfully serve his interest. Any other rule would put a premium upon pretended incompetence of coun-

46. Significantly, in rejecting the *Fitzgerald* standard, the Third Circuit failed to realize that the Fifth Circuit test does not preclude the granting of habeas relief in appropriate conflict situations involving privately retained counsel. As has been shown, when a defendant demonstrated the existence of an *actual* conflict which should have been apparent to the judge or prosecutor, or which violated the concerns of due process and fundamental fairness, the extraordinary relief afforded through federal habeas intervention has been granted. *Zuck v. Alabama*, 588 F.2d 436 (5th Cir. 1979), *petition for cert. filed*, 47 U.S.L.W. 3829 (U.S. May 21, 1979) (No. 78-1741); *Messelt v. Alabama*, 595 F.2d 247 (5th Cir. 1979); *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978). However, in the instant case, involving a Sixth Amendment ineffectiveness claim based upon a highly speculative conflict, the *Fitzgerald* standard would preclude federal review.

> sel for, if the rule were otherwise, a lawyer with a desperate case would have only to neglect it in order to ensure reversal or vacation of the conviction. *People v. Mitchell*, 411 Ill. 407, 104 N.E.2d 285 (1952).

Loukas v. Johnson, 453 F.2d at 408.

Finally, the *Fitzgerald* standard provides federal habeas review for all claims of *actual* conflict of interest. Thus, the distinction used in retained counsel situations not only limits review to compelling conflict claims, but it also lends a degree of finality to criminal litigation.[47]

When applied to this case, the soundness of the *Fitzgerald* standard is apparent. At trial, there was not the slightest indication that the loyalty of Sullivan's attorneys were divided. On the contrary, the record shows quite plainly that these two men, described as "two of Philadelphia's best known trial attorneys," represented Sullivan with great skill and vigor (Pet. App. 3A; 593 F.2d at 525). Under these circumstances, it is clear that neither the trial judge nor the prosecutor acted irresponsibly in failing to inquire as to "the possibility of a conflict, however remote." This is particularly true because the defendants were tried separately. *See Miller v. United States*, 564 F.2d 103, 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 931 (1978). Under these circumstances, it is clear that the Third Circuit erred in even considering the Sixth Amendment claims raised below.[48] The primary issue in habeas review

47. *See Durfee v. Duke*, 375 U.S. 106, 111 (1963) ("Public policy dictates that there be an end of litigation . . ."); *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 232 (1804) (per Marshall, C.J.) ("[I]t is desirable to terminate every cause upon its real merits . . . and put an end to litigation when it is within the power of the court to do so.").

48. Significantly, the decision below was based wholly upon a Sixth Amendment claim of speculative conflict; no due process or fundamental fairness claim was even discussed. Accordingly, the standard of review appropriate in cases where counsel was retained is properly applied here. *See Zuck v. Alabama*, 588 F.2d 436.

is the presence or absence of state action under the particular facts of the case. Viewed in this perspective, there is nothing unsound or unreasonable in drawing distinctions that might not otherwise be drawn. The Third Circuit failed to appreciate that state action, not the status of counsel, is the threshold inquiry for habeas corpus review.[49]

49. In his answer to the Commonwealth's petition for certiorari, Sullivan argued that the Commonwealth's state action argument, although discussed by Judge Garth below (Pet. App. 2A-3A; 593 F.2d at 524-525), had been waived because it was not included in the Commonwealth's brief to the Third Circuit. This Court has consistently reviewed similarly presented issues. *Rose v. Mitchell*, 99 S. Ct. 2993, 3009 (1979); *Procunier v. Navarette*, 434 U.S. 555 (1978); *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976); *Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971); *Moragne v. State Marine Lines, Inc.*, 389 U.S. 375, 378 n.1 (1970); *Allen v. Board of Elections*, 393 U.S. 544, 554 (1969); *United States v. Speers*, 382 U.S. 266, 277 n.22 (1965); *Silber v. United States*, 370 U.S. 717 (1962). The general rationale underlying these decisions is: 1) the disputed issue was fairly encompassed by the claims discussed in the lower courts or was in fact discussed by one of the lower courts, and 2) the record allows for full evaluation of the issue. The state action argument conforms to both these requirements. It was discussed by Judge Garth below. In addition, it is fairly encompassed by all the opinions below, as any discussion of infringement of Sixth Amendment rights is predicated on underlying state action. Finally, the issue may be fully evaluated on the record before this Court. Thus, the issue has not been waived. Moreover, as the state action question is virtually tantamount to jurisdiction, it is an issue of exceptional importance which could properly be discussed by this Court even if not raised by the Commonwealth. *Youakim v. Miller*, 425 U.S. 231 (1976); *Duignan v. United States*, 274 U.S. 195 (1927).

ARGUMENT III

THE THIRD CIRCUIT TRANSGRESSED APPROPRIATE LIMITS OF APPELLATE REVIEW BY MAKING DE NOVO FINDINGS OF FACT AND CREDIBILITY BASED SOLELY UPON ITS ASSESSMENT OF THE RECORD OF THE STATE COURT HEARING.

Under settled principles of habeas corpus review, the Third Circuit was required to accept as presumptively correct the findings of fact made by the state court after a hearing on the merits of respondent Sullivan's conflict of interest claim. 28 U.S.C. §2254(d); *LaVallee v. Delle Rose*, 410 U.S. 690, 691-695 (1973); *Townsend v. Sain*, 372 U.S. 293, 314-315 (1963). If the Third Circuit determined that those findings were incomplete or inadequate for purposes of appellate review, the court should have remanded the case to the district court for a plenary evidentiary hearing at which a competent resolution of inconsistent testimony and of witness credibility could be made. *Townsend v. Sain*, 372 U.S. at 312-316. *See also United States ex rel. McNair v. New Jersey*, 492 F.2d 1307 (3d Cir. 1974). Contrary to these principles of comity, the Third Circuit made its own *de novo* findings of fact and credibility, based solely upon review of the written transcript of the state court hearing. As a result, the Third Circuit erroneously granted the writ, based not upon the proper application of legal principles to findings of fact made by a lower court, but upon that appellate court's own speculative findings of fact, and a determination that those "facts" gave rise to a possible conflict of interest on the part of counsel. Thus, even if this Court adopts the Third Circuit standard and holds that the Sixth Amendment guarantee will afford relief to a defendant who establishes the possibility of a conflict of interest on the part of counsel, the decision below must nevertheless be reversed.

The Third Circuit based its finding of a possible conflict of interest upon the equivocal testimony of A. Charles Peruto, who assisted lead counsel DiBona at Sullivan's trial. Peruto, who repeatedly admitted at the state court hearing that his recollection of specific discussions held eight years earlier was meager, testified that at Sullivan's trial he had advised against presenting a defense case for various reasons, including a concern for avoiding disclosure of witnesses prior to the trials of the two co-defendants. Rejecting the determinations of the district court and of the state courts that Sullivan was not entitled to relief, the Third Circuit *sua sponte* credited Peruto's assertions regarding his tactical suggestions and his motivation, and indeed accorded them dispositive weight, simply because "[n]o reason or evidence is offered to explain why an attorney would make [this] damaging admission of professional impropriety . . . were it not true" (Pet. App. 17B; 593 F.2d at 522).

The logic of the Third Circuit is fundamentally flawed by a misperception of the precise issue before the court, and by a misunderstanding of the proper limits of appellate review of state court adjudications.

Unquestionably, a federal appellate court reviewing the denial of habeas corpus relief has the power, and the duty, to independently assess the legal and constitutional significance of elemental facts as found by a state hearing court. *See, e.g., Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972). However, whether Peruto ever *in fact* advised against presenting a defense, and, if so, whether that advice was *in fact* motivated by a concern for the other two co-defendants, were just that—questions of basic and elemental fact, properly answerable only by a hearing court afforded the opportunity to observe the witness and to evaluate his ability to remember and his credibility. *Townsend v. Sain*, 372 U.S. at 309 n. 6; *Brown v. Allen*, 344 U.S. 443, 506 (1953) (opinion of Mr. Justice Frankfurter). The Third Circuit was required to review the findings of

the state court consonant with that court's denial of relief. *See, e.g., LaVallee v. Delle Rose,* 410 U.S. at 695. Upon such review, the Third Circuit could have found that the state court necessarily rejected Peruto's testimony, or that the state court made no explicit finding because, regardless of that testimony, Sullivan was not entitled to relief. If the Third Circuit determined that the state court's decision was not supported by the record, or that the state court, which applied an actual conflict standard, had failed to make specific or adequate findings of fact relevant to the different test applied by the federal court, the only proper recourse was to remand the case to the district court for an independent evidentiary hearing and findings of fact. *Townsend v. Sain,* 372 U.S. at 312-316.

Instead of following this appropriate course, the Third Circuit exceeded its legitimate authority by making its own determination that Peruto's testimony was worthy of belief and acceptance. Rejecting any consideration of the Commonwealth's argument that Judge DiBona's testimony, and other evidence of record, conclusively rebutted any possibility of conflict, the Third Circuit granted relief because "[w]e have no basis on which to reject Peruto's sworn admission that he injected improper considerations into the attorney-client relationship" (Pet. App. 17B; 593 F.2d at 522).

Apart from the inherent unreliability of such factual findings by an appellate court, the Third Circuit's logic in so crediting Peruto's testimony cannot withstand scrutiny. In presuming Peruto's veracity, the court not only relieved Sullivan of his burden of rebutting the presumptive regularity and legitimacy of his conviction, but also utterly ignored the possibility that Peruto's recollection of the trial was inaccurate, whether by intent or by mistake. The Third Circuit gave no consideration to the inherent bias defense counsel may retain after his client's conviction. The impact of that bias upon the attorney's ability to suddenly become an objective witness in a collateral attack

on that conviction can properly be evaluated only by the primary finder of fact at an evidentiary hearing. The Third Circuit failed to perceive that such bias could prompt an attorney, subliminally or not, to reconstruct the events of the past in order to obtain the originally desired goal of acquittal. *See, e.g., Loukas v. Johnson,* 453 F.2d 407 (6th Cir. 1978); *Commonwealth v. Napper,* 254 Pa. Super. Ct. 54, 385 A.2d 521 (1978). That possibility becomes far from problematic in light of Peruto's admitted personal disagreement with the jury's verdict. That he may have perceived the opportunity to testify at the hearing as a vehicle for righting a past "wrong" cannot be ignored. Moreover, the Third Circuit's *a fortiori* reasoning becomes even less acceptable upon review of the record that discloses the speculative nature of Peruto's testimony, his admittedly limited memory of the events eight years earlier, and the denial of the existence of conflicting interests by Judge DiBona, which was credited by the district court and the state courts.[50]

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50. The Third Circuit's further acceptance of the record testimony of Sullivan and of Carchidi, as corroborating Peruto, is equally questionable. Carchidi's willingness to testify, asserted after he was relieved of jeopardy, cannot logically be transposed into a finding that while awaiting trial on two counts of murder, with the possibility of a death penalty if convicted, he would have abandoned his Fifth Amendment rights. Nor can Sullivan's self-serving declarations be worth even the slight credit accorded them by the Third Circuit. *See* Argument I, *supra* at 19-24.

The impropriety of the assumption of *de novo* fact finding authority by the Third Circuit is further dramatized by the statement in the court's opinion that certain of the putative defense trial witnesses have since died (Pet. App. 20B; 593 F.2d at 523). As the commonwealth pointed out in its brief to that court, there is no record evidence whatever in support of that finding. The Third Circuit's conclusion could only have been based upon alleged death certificates, never stipulated to or entered into evidence, attached to Sullivan's brief filed in the Pennsylvania Supreme Court.

Even if as a matter of law a defendant is entitled to relief upon showing the possibility of a conflict of interest, he still bears the burden of establishing that such a possibility existed as a matter of fact by credible and probative evidence. Thus it is inconceivable that the court below would have granted the writ solely upon Sullivan's own claim that his attorneys deferred to the interests of his co-defendants. Nor would the court have accepted a legal argument, unadorned by direct evidence, that the possibility of conflict existed anytime multiple defendants were separately tried, since counsel would naturally desire to prevent discovery of all defense evidence at the first trial. Acceptance of either of those claims would be illogical and tantamount to *per se* prohibition of joint representation under any circumstances, a conclusion contrary to the clear decision of this Court in *Holloway v. Arkansas*, 435 U.S. 475 (1978).

The Commonwealth does not dispute the Third Circuit's responsibility to determine the existence of a possible conflict of interest as a matter of law under that court's interpretation of the constitutional standard of review. The Commonwealth, however, does seriously contest the Third Circuit's authority to make findings of fact necessary to support that legal determination solely upon the court's reading of the record. Thus, because the court below exceeded the legitimate bounds of appellate review, even if this Court accepts the legal standard formulated by the Third Circuit, the case must be remanded to the district court for an independent evidentiary hearing and for appropriate findings of fact.[51]

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51. Of course, should this Court reject the Third Circuit's standard but adopt a legal standard other than the actual conflict test advocated in Argument I, *supra*, and applied by the Pennsylvania courts, the case must be remanded to the district court for appropriate findings of fact.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM

I. FEDERAL CASES

FIRST CIRCUIT

Standard

In joint representation cases, the defendant has the burden of establishing an actual conflict between his interests and those of his co-defendants. *United States v. Foster,* 469 F.2d 1 (1st Cir. 1972).

Duty to Inquire

In *United States v. Foster,* 469 F.2d 1 (1st Cir. 1972), the court announced a prospective rule, pursuant to its supervisory powers, that the district courts must inquire of jointly-represented defendants regarding the risks of joint representation. In *United States v. Donahue,* 560 F.2d 1039 (1st Cir. 1977), the court expanded the scope of the inquiry and ruled that the district courts must fully advise jointly represented defendants of the *specific dangers* which such representation could entail. The court later held that its ruling in *Donahue* was not constitutionally mandated but was a mere expansion of a supervisory rule. *United States v. Waldman,* 579 F.2d 649 (1st Cir. 1978).

Review of State Court Convictions

In a district court opinion, the court stated that the court's supervisory rule requiring an inquiry is not binding upon state courts. *LaFleur v. Hall,* 383 F.Supp. 1188, 1190 n.3 (D. Mass. 1974). Presumably, in such cases, the burden of proof would be on the defendant.

Burden of Proof

The First Circuit's articulation of burden of proof is, at best, confusing. In joint representation cases, where the district court has fulfilled its duty to inquire, the defendant has a "heavy burden" of persuasion. *United States v. Foster,* 469 F.2d at 5. *See United States v. DiCarlo,* 575 F.2d 952, 957 (1st Cir.), *cert. denied,* 439 U.S. 834 (1978). However, in cases where the court sought to distinguish the defendant's burden of proof in cases of joint representation, from the situation where defense counsel has a legal relationship with a hostile party or witness (which the court describes as "dual" representation), the court noted that, in joint representation cases, "only a relatively slight showing of actual prejudice is required." *United States v. DiCarlo,* 575 F.2d at 957; *Miller v. United States,* 564 F.2d 103, 106 (1st Cir. 1977), *cert. denied,* 435 U.S. 931 (1978). (Joint representation appears to refer to representation of two or more co-defendants at a single trial.) By contrast, in cases of dual representation, as defined by the court, the defendant must establish "a real conflict of interest or a specific instance of prejudice." *United States v. DiCarlo,* 575 F.2d at 957; *Miller v. United States,* 564 F.2d at 106.

Where there is no adequate inquiry on the record, the burden of proof shifts to the government. On direct appeal, from convictions in the district courts, the government must demonstrate from the record that prejudice was "improbable." On collateral attack, by a federal prisoner, under

28 U.S.C. §2255, the government must establish the "unlikelihood of prejudice" by a preponderance of the evidence. *United States v. Foster*, 469 F.2d at 5.

Retained/ Appointed

The court draws no distinction between retained and appointed counsel. *United States v. Foster*, 469 F.2d at 4 n.2.

Joint/ Separate Trials

In *Marxuach v. United States*, 398 F.2d 548, 552 (1st Cir.), *cert. denied*, 393 U. S. 982 (1968), the court noted that, where there was a severance, it was more reasonable to have the same attorney represent both defendants. (Severance was due to feigned illness of co-defendant.)

SECOND CIRCUIT

Standard

A jointly represented defendant, who claims a conflict of interest, must show "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation." *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970).

Duty to Inquire

In *United States v. DeBerry*, 487 F.2d 448, 452-453 (2d Cir. 1973), the court announced a prospective rule that the district courts must conduct a careful inquiry of jointly represented defendants regarding the potential for a conflict of interest in the joint representation.

Review of State Court Convictions

In *Salomon v. LaValle*, 575 F.2d 1051, 1055 (2d Cir. 1978), the court specifically reserved decision on whether the court's supervisory rule, requiring an inquiry by

the trial court and the attending shift in the burden of proof absent a satisfactory inquiry, would apply to a review of a state court conviction. 575 F.2d at 1055. *But see Colon v. Fogg*, 603 F.2d 403 (2d Cir. 1979), where the court, in a case involving Salomon's co-defendant, without any discussion of the issue, reversed the district court's order and ruled that the state failed to meet its burden of proving the absence of prejudice.

Burden of Proof

Where the district court conducts an inquiry, on appeal, the defendant bears the burden of proving that prejudice resulted. *Salomon v. LaVallee*, 575 F.2d 1051 (2d Cir. 1978). Absent a satisfactory inquiry on the record, the burden of proof shifts to the government, and the government must establish the "lack of prejudice." *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976); *Salomon v. LaVallee*, 575 F.2d 1051, 1055 (2d Cir. 1978).

Retained/ Appointed

No distinction drawn. *See United States v. Carrigan*, 543 F.2d 1053, 1057 (2d Cir. 1976).

THIRD CIRCUIT

Standard

Burden of Proof

Representation of co-defendants by the same attorney is not a *per se* violation of the Sixth Amendment. A defendant has the burden of showing a possible conflict of interest or prejudice, however remote, before a reviewing court will find joint representation constitutionally defective.

Walker v. United States, 422 F.2d 374, 375 (3d Cir.) (*per curiam*), *cert. denied*, 399 U.S. 915 (1970)

Duty to Inquire

No *per se* rule requiring inquiry. *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 211 (3d Cir. 1973).

No supervisory rule requiring inquiry; however, inquiry is the suggested procedure in joint representation cases. *United States ex rel. Hart v. Davenport*, 478 F.2d at 211.

Retained/ Appointed

No distinction drawn. *United States ex rel. Hart v. Davenport*, 478 F.2d at 211.

FOURTH CIRCUIT

Standard

"[S]ome specific instance of prejudice, some real conflict of interest, resulting from the joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel." *United States v. Atkinson*, 565 F.2d 1283, 1284 (4th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) (quoting *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir. 1970).

Although in a prior case, the Fourth Circuit quoted the Third Circuit standard with approval (*United States v. Truglio*, 493 F.2d 574 (4th Cir. 1974)), that case was distinguished in *Atkinson* where the court noted that "[i]n [Truglio] . . . the record disclosed a patent conflict of interest which impaired the defendant's right to the unfettered and effective assistance of

counsel." *United States v. Atkinson*, 565 F.2d at 1284.

Burden of Proof

Burden of proof is on defendant to show that his constitutional rights were violated. *Post v. Boles*, 332 F.2d 738 (4th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965).

Duty to Inquire

Inquiry may be advisable, especially where defendants have court-appointed counsel, but failure to inquire does not obviate the need to show a real conflict of interest. *United States v. Atkinson*, 565 F.2d at 1284.

Retained/ Appointed

United States v. Atkinson, 565 F.2d 1283, inferentially suggests a greater need to inquire if counsel is appointed.

FIFTH CIRCUIT

Standard

The burden is on the defendant to prove an "actual, significant conflict." *Foxworth v. Wainwright*, 516 F.2d 1072, 1077 n.7 (5th Cir. 1975). "An alleged conflict that obstructs the use of a particular strategy or defense is not significant unless the defense is plausible." *Id.* at 1080. *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979), *petition for cert. filed*, 47 U.S.L.W. 3829 (U.S. May 21, 1979) (No. 78-1741).

Duty to Inquire

The court must inquire in retained counsel situations only when the conflict is so apparent that the judge "should have been aware of and corrected it." *Alvarez v. Wainwright*, 522 F.2d 100, 105 n.111 (5th Cir. 1975).

Retained/ Appointed

In court-appointed cases, the trial court "may be under an affirmative duty to inquire" when counsel informs the court of a possible conflict. Without such notice, however, "the [c]ourt does not bear the responsibility of informing co-defendants of possible problems of joint representation." *Gov't of Canal Zone v. Hodges*, 589 F.2d 207, 209 (5th Cir.), *cert. denied*, 99 S.Ct. 2173 (1979).

SIXTH CIRCUIT

Standard

Burden of Proof

In *United States v. Woods*, 544 F.2d 242, 269 (6th Cir 1976), *cert. denied*, 430 U.S. 969 (1977), the court held that, where a conflict of interest is alleged, the defendant has the burden of proving "some actual prejudice" or an "actual conflict of interest." *See also United States v. Cale*, 418 F.2d 897, 899 (6th Cir. 1969), *cert. denied*, 397 U.S. 1015 (1970). The "mere possibility" of conflict is insufficient to overturn a conviction. *Thacker v. Bordenkircher*, 590 F.2d 640, 641 (6th Cir.), *cert. denied*, 99 S.Ct. 2827 (1979); *United States v. LaRiche*, 549 F.2d 1088, 1095 (6th Cir.), *cert. denied*, 430 U.S. 987, *cert. denied sub nom. Cisternino v. United States*, 434 U.S. 966 (1977).

Duty to Inquire

The court declined to adopt a *per se* rule requiring district judges to conduct a pretrial conflict of interest hearing in all cases of joint representation by retained counsel. *United States v. Steele*, 576 F.2d 111, 112 (6th Cir.), *cert. denied*, 439 U.S. 928 (1978).

Review of State Court Convictions

"In a habeas corpus action where the highest court of the [s]tate declares in an opinion that it has reviewed the evidence and failed to find any conflict and the district court has reached the same conclusion we require a clear showing of error before we will set aside these findings." *Thacker v. Bordenkircher*, 590 F.2d at 641.

Retained/ Appointed

"[P]rivately retained counsel's determination that there was no conflict of interest must weigh heavily" against the defendant. *United States v. Cale*, 418 F.2d at 898. *See also United States v. Martinez*, 428 F.2d 86, 87 (6th Cir. 1970), *cert. denied*, 402 U.S. 951 (1771).

Miscellaneous Considerations

Failure to raise the alleged conflict or request a severance in the lower court appears to be a factor weighing against finding an actual conflict. *See United States v. Jones*, 436 F.2d 971, 972 (6th Cir. 1971); *United States v. Martinez*, 428 F.2d at 87.

SEVENTH CIRCUIT

Standard

Burden of Proof

Defendant has burden "to demonstrate, with a reasonable degree of specificity, that a conflict of interests actually existed at trial." *United States v Mandell*, 525 F.2d 671, 677 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976); *United States ex rel. Robinson v. Housewright*, 525 F.2d 988, 994 (7th Cir. 1975). The court explicitly notes that it does "not adopt as low a stan-

dard of proof as that articulated by the Third Circuit in its decisions." *United States v. Mandell*, 525 F.2d at 677 n.11.

Duty to Inquire

The court places the responsibility on defense counsel to inform defendants of potential dangers of multiple client representation. Trial court must watch for *indicia* of conflict during trial. *United States v. Mavrick*. 601 F.2d 921, 929 (7th Cir. 1979); *United States v. Mandell*, 525 F.2d at 677.

Where possibility of conflict appears during trial, court must investigate relevant facts, advise defendants, and determine whether continued representation, absent a waiver, violates the Sixth Amendment. When actual conflict appears, the court must bring the fact of its existence, and the resulting dangers, to the attention of each defendant so that an informed judgment can be made about securing new counsel. The court rejects D.C. Circuit rule. *United States v. Gaines*, 529 F.2d 1038, 1043-1044 (7th Cir. 1976). Where the trial court is informed of a conflict by defendant's attorney, he must appoint separate counsel, or take adequate steps to determine if risk of conflict is too remote to warrant separate counsel. *United States ex rel. Garrett v. Lane*, 464 F. Supp. 793 (E.D. Ill. 1979).

Retained/ Appointed

The court notes that "we do not conceive the duty resting upon appointed counsel to be any less than upon retained counsel insofar as avoiding conflict of interest is

concerned." *United States ex rel. Robinson v. Housewright*, 525 F.2d at 994 n.8.

"[I]n the case of appointed counsel, it is especially important for the [trial] court to determine that no prejudice will result from multiple representation." *United States v. Gougis*, 374 F.2d 758, 761 (7th Cir. 1967). The court specifically reserves decision on the question of whether a defendant's right to counsel of his own choice includes the selection of an attorney who has a conflict of interest. *United States v. Gaines*, 529 F.2d at 1043.

EIGHTH CIRCUIT

Standard

A defendant raising a conflict of interest has the burden to show an "actual conflict" or a "substantial possibility of a conflict." *United States v. Cox*, 580 F.2d 317, 323 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979). Only a minimal showing is required. *Beran v. United States*, 580 F.2d 324, 326 (8th Cir. 1978), *cert. denied*, 99 S.Ct. 1422 (1979).

Duty to Inquire

In *United States v. Williams*, 429 F.2d 158, 161 (8th Cir.), *cert. denied*, 400 U.S. 947 (1970), the court announced a prospective rule that the district courts must conduct a "careful inquiry" regarding the "possibility of a conflict of interest" before *appointing* an attorney to jointly represent co-defendants. In *United States v. Lawriw*, 568 F.2d 98 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978), the court ex-

tended this inquiry to cases where co-defendants are jointly represented by *retained* counsel; in *United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978), this latter ruling was held prospective.

Burden of Proof

The defendant has the burden of proof, and the burden does not shift to the government, even in the absence of an inquiry by the trial court. *United States v. Lawriw*, 568 F.2d at 105. However, as to the issue of whether the defendant *waived* his right to separate counsel, the burden of proof is upon the government. *Austin v. Erickson*, 477 F.2d 620, 626 (8th Cir. 1973).

Retained/ Appointed

The court draws no distinction but notes that it is a proper factor to consider in determining whether a defendant waived his right to separate counsel. *Larry Buffalo Chief v. South Dakota*, 425 F.2d 271, 279 n.5 (8th Cir. 1970).

NINTH CIRCUIT

Standard

Burden of Proof

Defendant bears burden of demonstrating that specific prejudice has resulted from alleged conflict of interest. *United States v. Partin*, 601 F.2d 1000, 1009 (9th Cir. 1979). *United States v. Eaglin*, 571 F.2d 1069, 1086 (9th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978).

Counsel may represent more than one defendant if interests of latter are not in conflict. *Carlson v. Nelson*, 443 F.2d 21, 22 (9th Cir. 1971).

Defendant may waive right to counsel with undivided loyalty. *United States v. Partin*, 601 F.2d at 1007.

Duty to Inquire

If challenge is on ground that counsel represents more than one defendant, court, absent unusual circumstances, will reject claim if trial court made sufficient inquiry of parties and counsel about possible conflicts. *United States v. Eaglin*, 571 F.2d at 1086. Court must be able to rely on counsel's representation that possibility of conflict does or does not exist. *United States v. Horne*, 423 F.2d 630, 631 (9th Cir. 1970) (representation made by counsel pre-trial).

Retained/ Appointed

Court holds that competency of counsel is to be judged by same standard, whether counsel is retained or appointed. Thus, the fact that counsel was retained is not an absolute bar to a claim of ineffective assistance of counsel. Court reserves question of whether, in a particular case, a different standard may be applicable where counsel is retained rather than appointed. *United States v. Marshall*, 488 F.2d 1169, 1193 (9th Cir. 1973).

Review of State Court Convictions

State habeas petitioner has burden of establishing specific prejudice. *Davidson v. Cupp*, 446 F.2d 642, 643 (9th Cir. 1971).

Standard

The court has not formulated a particular standard, *Fryar v. United States*, 404 F.2d 1071, 1073 n.2 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969), but has held that the conviction will be affirmed absent a showing of prejudice, *United States v. Smith*, 464 F.2d 194, 197 (10th Cir.), *cert. denied*, 409 U.S. 1066 (1972); *Fryar v. United States*, 404 F.2d at 1073, or an actual conflict of interest. *See McHenry v. United States*, 420 F.2d 927, 928 (10th Cir. 1970); *Jones v. Baker*, 406 F.2d 739, 740 (10th Cir. 1969).

Burden of Proof

The burden of proof appears to be upon the defendant, *Mesch v. United States*, 407 F.2d 1290, 1290-1291 (10th Cir.), *cert. denied*, 396 U.S. 826 (1969), *Fryar v. United States*, 404 F.2d at 1073, but the court will examine the entire record under the totality of the circumstances. *United States v. McCoy*, 573 F.2d 14, 17 (10th Cir.) *cert. denied*, 436 U.S. 958 (1978); *McHenry v. United States*, 420 F.2d 927, 928 (10th Cir., 1970).

Duty to Inquire

The Tenth Circuit has held that the "procedural fact" that the trial court failed to make a pre-trial inquiry into the possibility of a conflict is not determinative, absent a showing of prejudice. *Mesch v. United States*, 407 F.2d at 1290.

Appointed/ Retained

The court, in *Fryar v. United States*, 404 F.2d at 1073, suggested the appointment of separate counsel for indigent co-defendants.

Standard

Relying upon 18 U.S.C. §3006(a)(b), the court, in *Ford v. United States*, 379 F.2d 123, 125-126 (D.C. Cir. 1967) adopted a prospective rule that separate counsel should be initially appointed in every case, with an instruction that, if counsel concludes, after fully investigating the case and consulting with his client, that the defendant will best be served by joint representation, counsel's conclusion with supporting reasons, should be communicated to the court for an on-the-record disposition.

Duty to Inquire

Where counsel is retained, the trial court has a duty to make a determination that co-defendants have intelligently chosen to be jointly represented. *United States v. Liddy*, 348 F.Supp. 198, 200 (D. D.C. 1972).

Prior to the court's pronouncement in *Ford*, the court had held that, where there are indications in the record that "stir doubts" about the effectiveness of joint representation, those doubts should be resolved in favor of the defendant, especially where there has been no inquiry by the trial court. *Lollar v. United States*, 376 F.2d 243, 247 (D.C. Cir. 1967). Where there can be "an informed speculation" that defendant was prejudiced, a new trial will be granted. *Lollar v. United States*, 376 F.2d at 247. *Cf. United States v. Mackin*, 502 F.2d 429, 439 (D.C. Cir.), *cert. denied*, 419 U.S. 1052 (1974) where

the court rejected defendant's claim of conflict on the ground that "[t]he charge of prejudice [was] speculative, without even gossamer support in the record."

Burden of Proof

"[W]here the record does not show that co-defendants' decision to proceed with one attorney was an informed one, the burden is on the [g]overnment to show beyond a reasonable doubt that the denial of the defendants' rights is harmless error, . . ." *Ford v. United States*, 379 F.2d at 125 (citation omitted). However, it appears that the defendant has the burden of going forward with the evidence, and must state a claim upon which relief could be granted before the burden of proof shifts to the government. *United States v. McCord*, 509 F.2d 344, 352 and n.65, 355 n.69 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975).

Retained/ Appointed

The court noted that it will closely scrutinize cases where counsel is *appointed* rather than retained. *Lollar v. United States*, 376 F.2d at 247. However, in *Campbell v. United States*, 352 F.2d 359 (D.C. Cir. 1965), the court held that the mere fact that counsel was retained does not relieve the trial court of its duty to inquire.

Separate/ Joint Trial

In *United States v. Thornton*, 462 F.2d 307 (D.C. Cir. 1972), a *per curiam* opinion, the court summarily stated that, as the cases were separately tried, no prejudice resulted from counsel's representation of the co-defendant.

II. STATE CASES

1. Twenty-six states require that the defendant establish an actual conflict of interest or prejudice, or adopt a similar test.

Arizona: *State v. Davis*, 110 Ariz. 29, 514 P.2d 1025 (Sup. Ct. 1973) ("actual conflict").

Arkansas: *Holloway v. State*, 260 Ark. 250, 539 S.W. 2d 435 (Sup. Ct. 1978), *rev'd., Holloway v. Arkansas*, 435 U.S. 475 (1978) ("some material basis for an alleged conflict of interest;" "some factual demonstration of a conflict of interest").

Colorado: *People v. Romero*, 189 Colo. 526, 543 P.2d 56 (Sup. Ct. 1975) ("some specific instance of prejudice, some real conflict of interest").

Connecticut: *State v. Marion*, 175 Conn. 211, 397 A.2d 533 (Sup. Ct. 1978) ("some factual basis that a conflict of interest actually existed").

Delaware: *Hill v. State*, 316 A.2d 557 (Sup. Ct. 1974) ("some conflict must be established").

Florida: *Belton v. State*, 217 So.2d 97 (Sup. Ct. 1978) (failure to appoint separate counsel not error if no objection unless defendant shows conflict of interest or some prejudice resulting from representation).

Georgia: *Munford v. Seay*, 241 Ga. 223, 244 S.E.2d 857 (Sup. Ct. 1978) ("must show a conflict harmful to himself").

Idaho: *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (Sup. Ct. 1968) ("the facts [must]

show that the interests of the two defendants are in conflict").

Illinois: *People v. Vriner*, 74 Ill. App.3d 329, 24 Ill. Dec. 520, 385 N.E.2d 671 (Sup. Ct. 1978), *cert. denied, Vriner v. Illinois*, 99 S.Ct. 2858 (1979) ("actual conflict of interest manifested at trial").

Indiana: *Patterson v. State*, 386 N.E.2d 936 (Sup. Ct. 1979) ("actual existence of a conflict").

Iowa: *Jackson v. Auger*, 239 N.W.2d 180 (Sup. Ct. 1976) ("substantial possibility that the situation of dual representation created a conflict").

Louisiana: *State ex rel. Thompson v. Henderson*, 306 So.2d 713 (Sup. Ct. 1975) ("actual conflict of interest").

Maryland: *Pressley v. State*, 220 Md. 558, 155 A.2d 494 (Ct. App. 1959) ("To show prejudice there must be revealed an actual or imminently potential conflict of interest which prevented a lawyer from impartially and adequately representing his clients").

Massachusetts: *Commonwealth v. Soffen*, 386 N.E.2d 1030 (Sup. Jud. Ct. 1979) (where attorney represents co-defendants at separate proceedings, defendant must show a "genuine conflict of interest;" or "if a more tenuous conflict appears, we might still reverse the judgment on a showing of material prejudice." If attorney represents multiple defendants at same trial, court must make inquiry. See Section 2, *infra*).

Mississippi: *Irving v. State*, 361 So.2d 1360 (Sup. Ct. 1978), *cert. denied, Irving v. Mississippi*, 99 S. Ct. 2014 (1979) ("no conflict of interest;" "[no] prejudice or harm resulting to appellant on account of the alleged conflict").

Missouri: *Mason v. State*, 468 S.W.2d 617 (Sup. Ct. 1971) ("whether conflict of interest of counsel . . . actually existed").

Montana: *State v. Henry*, 582 P.2d 321 (Sup. Ct. 1978) ("actual conflict of interest prejudicing his defense").

New York: *People v. Gomberg*, 38 N.Y.2d 307, 379 N.Y.S.2d 769, 342 N.E.2d 550 (Ct. App. 1975) ("A conflict exists only when the individual defenses 'run afoul of each other' ").

North Carolina: *State v. Engle*, 5 N.C.App. 101, 167 S.E.2d 864 (Ct. App. 1969) ("some conflict of interest must be shown").

Oklahoma: *Wright v. State*, 505 P.2d 507 (Crim. App. 1973) (no denial "unless a conflict of interest or prejudice results").

Pennsylvania: *Commonwealth v. Breaker*, 456 Pa. 341, 318 A.2d 354 (Sup. Ct. 1974) ("conflict of interest actually existed at trial").

South Dakota: *State v. Means*, 268 N.W.2d 802 (Sup. Ct. 1978) ("some specific instance of prejudice, some real conflict of interest").

Texas: *Stutes v. State*, 530 S.W.2d 309 (Crim. App. 1975) ("actual conflict of interest" where counsel appointed).

Washington: *State v. Myers*, 86 Wash.2d 419, 545 P.2d 538 (Sup. Ct. 1976) ("must be some prejudice to a defendant").

West Virginia: *State ex rel. Postelwaite v. Bechtold*, 212 S.E.2d 69 (Sup. Ct. App. 1975), *cert. denied, Postelwaite v. Bechtold*, 424 U.S. 909 (1976) ("actual conflict").

Wisconsin: *State v. Medrano*, 84 Wis.2d 11, 267 N.W. 2d 586 (Sup. Ct. 1978) ("actual conflict").

2. Five states require the trial court to advise the defendant of the potential dangers inherent in joint representation; in the absence of an adequate inquiry on the record, the burden of proof shifts to the prosecution to show the absence of a prejudicial conflict.

Alaska: *Moreau v. State*, 588 P.2d 275 (Sup. Ct. 1978).

Massachusetts: *Commonwealth v. Davis*, 384 N.E.2d 181 (Sup. Jud. Ct. 1978) (where attorney represents co-defendants at joint trial).

Minnesota: *State v. Olsen*, 258 N.W.2d 898 (Sup. Ct. 1977).

New Jersey: *State v. Land*, 73 N.J. 24, 372 A.2d 297 (Sup. Ct. 1977) (absent colloquy and waiver on record, if a potential conflict exists, prejudice is presumed).

New York: *People v. Gomberg*, 38 N.Y.2d 307, 379 N.Y.S.2d 769, 342 N.E.2d 550 (Ct. App. 1975) (but court "must be careful not to pursue its inquiry too far as it may infringe upon the defendant's right to retain and confer with counsel of his own choice").

See also *People v. Cook*, 13 Cal. 3d 663, 119 Cal. Rptr. 500, 532 P.2d 148 (Cal. Sup. Ct. 1975) (where multiple defendants freely and voluntarily retain joint counsel, "it is extremely doubtful that defendants' right to retain counsel of their own choice could or should be challenged by the trial court").

3. Four states will grant relief under certain circumstances upon a showing of less than an actual conflict of interest.

California: *People v. Cook*, 13 Cal. 3d 663, 119 Cal. Rptr. 500, 532 P.2d 148 (Sup. Ct.), *cert. denied, Cook v. California*, 423 U.S. 870 (1975) ("informed speculation," which must be grounded upon a factual basis in the record, that there was a potential conflict of interest which prejudicially affected the right to effective counsel, where counsel is appointed, the court has the burden of ascertaining whether a potential conflict exists, and the defendant will be entitled to relief upon a showing of some prejudice. Where counsel is retained, relief will be granted only if the trial was a "farce or a sham").

Maryland: *Pressley v. State*, 220 Md. 558, 155 A.2d 494 (Ct. App. 1959) ("actual or imminently potential conflict," but no relief granted where the defendant does not object, or where no prejudice is established).

Massachusetts: *Commonwealth v. Soffen*, 386 N.E.2d 1030 (Sup. Jud. Ct. 1979) ("genuine conflict of interest," but "if a more tenuous conflict

appears, we might still reverse the judgment on a showing of material prejudice").

New Hampshire: *State v. Theodore*, 392 A.2d 122 (Sup. Ct. 1978) (in *dicta*, the court stated that "a conviction must be reversed whenever there is more than a remote possibility that a criminal defendant was prejudiced by his attorney's simultaneous representation of another defendant").

4. Six states draw an explicit distinction between joint representation by retained and by appointed counsel.

Alabama: *Lee v. State*, 57 Ala.App. 366, 328 So.2d 617 (Crim. App. 1976), *cert. denied*, 295 Ala. 409, 328 So.2d 624 (Sup. Ct. 1976) ("it is less difficult to find an infringement of one's Sixth Amendment right" where counsel is appointed).

California: *People v. Cook*, 13 Cal.3d 663, 119 Cal. Rptr. 500, 532 P.2d 148 (Sup. Ct. 1975) (where counsel is appointed, the Court has the burden of ascertaining whether a potential conflict exists, and the defendant will be entitled to relief upon a showing of some prejudice. Where counsel is retained, relief will be granted only if the trial was a "farce or a sham").

Montana: *State v. Meidinger*, 160 Mont. 310, 502 P.2d 58 (Sup. Ct. 1972) ("where two defendants desire to retain one counsel their decision should be honored").

Oklahoma: *Wright v. State*, 505 P.2d 507 (Crim. App. 1973) ("We hold that these defendants

cannot now be heard to complain of any error committed by counsel whom they selected and retained").

Tennessee: *Leeper v. State*, 4 Tenn.Crim. 404, 472 S.W.2d 240 (Crim. App. 1971) (acts or non-acts of retained counsel are not imputable to the state).

Texas: *Stutes v. State*, 530 S.W.2d 309 (Crim. App. 1975) (where counsel is appointed, relief granted upon showing actual conflict. Where counsel is retained, no relief unless the "representation was fettered or restrained by his commitments to others, and such commitments were unknown to the defendant").

5. Twelve states have as yet articulated no clear standard of review.

Alabama: *Lee v. State*, 57 Ala.App. 366, 328 So.2d 617 (Crim. App. 1976) (conviction affirmed, court notes that any potential conflict was outweighed by the defendant's desire to have counsel jointly represent his spouse).

Kansas: *See, e.g., State v. Nelson*, 207 Kan. 794, 486 P.2d 1330 (Sup. Ct. 1971) (conviction affirmed where record shows no conflict). *But see State v. Sullivan*, 210 Kan. 842, 504 P.2d 190 (Sup. Ct. 1972) (conviction reversed where attorney objected to joint trial due to conflict).

Kentucky: *Ware v. Commonwealth*, 537 S.W.2d 174 (Sup. Ct. 1976) (appointment of separate

counsel "strongly suggested," but conviction affirmed where no actual conflict existed or developed during trial).

Maine: *Gayton v. Robbins*, 272 A.2d 776 (Sup. Jud. Ct. 1971) (conviction affirmed where defendant did not object to joint representation at trial and does not claim existence of conflict or prejudice).

Michigan: *People v. Bentley*, 402 Mich. 121, 261 N.W.2d 716 (Sup. Ct. 1978) (conviction reversed *per curiam* where motion to sever brought to court's attention conflict of interest and potential for prejudice).

Nebraska: *State v. Montgomery*, 182 Neb. 737, 157 N.W.2d 196 (Sup. Ct. 1968) (conviction reversed where conflict of interest apparent from admission of co-defendant's confession implicating defendant).

New Mexico: *State v. Tapia*, 75 N.M. 757, 411 P.2d 234 (Sup. Ct. 1966) (conviction reversed where conflict of interest apparent from admission of co-defendant's confession implicating defendant).

South Carolina: *Myers v. State*, 248 S.C. 539, 151 S.E.2d 665 (Sup. Ct. 1966) (conviction affirmed where defenses consistent and defendant made voluntary decision not to testify).

Tennessee: *Moran v. State*, 4 Tenn.Crim. 339, 472 S.W.2d 238 (Crim. App. 1971) (conviction reversed where conflict apparent; co-defendant entered guilty plea and testified against defendant).

Utah: *State v. Tippets*, 584 P.2d 892 (Sup. Ct. 1978) (conviction affirmed where record shows no prejudice or conflict, and it does not appear that attorney was less effective than he would have been if he had represented only one defendant).

Vermont: *State v. Truman*, 124 Vt. 285, 204 A.2d 93 (Sup. Ct. 1964) (conviction affirmed where defendant made no showing that joint representation "in any way embarrassed or jeopardized his fidelity" to the defendant's cause).

Virginia: *Penn v. Smyth*, 188 Va. 367, 49 S.E.2d 600 (Sup. Ct. App. 1948) (conviction affirmed where defendant alleged no facts showing that he suffered prejudice).

Research has disclosed no reported cases by a court of statewide jurisdiction concerning this issue in seven states: Hawaii, Nevada, North Dakota, Ohio, Oregon, Rhode Island, and Wyoming.

III. THE BRITISH COMMONWEALTH

In Britain and the Commonwealth nations, questions raised by joint representation are determined not by appellate courts but are left to the bar's rule-making and enforcement mechanisms. *See generally* W. W. Boulton, B.A., *A Guide to Conduct and Etiquette at the Bar* 21-35 (4th Ed. 1965). In general, counsel shall not appear for two clients whose interests may conflict, although counsel may represent multiple defendants if he has satisfied himself that all defendants have agreed to joint representation. The British Legal Aid Act provides that the court may

assign one counsel to represent two or more persons whose cases are to be heard together, unless the interests of justice require that the defendants be separately represented. *See* Halsbury's Laws of England (4th Ed.), Vols. 3 and 11; English and Empire Digest, Vol. 3; Legal Aid Act 1974, §28 *et seq.*; Annual Statement of the General Council of the Bar 1970-1971, at 32.